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833
832
No. 2301

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Defendant in Error.

VOLUME I.
(Pages 1 to 240, Inclusive.)

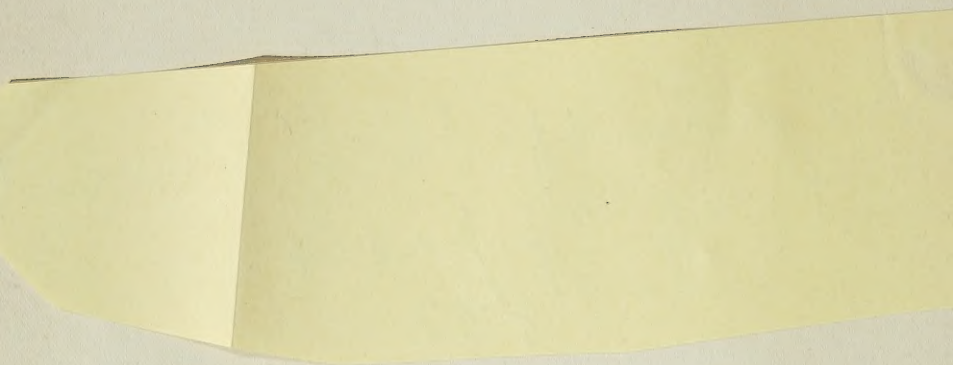
Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Third Division.

FILED

SEP 2 - 1913

Records of U. S. Circuit
Court of appeals

833



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(Pages 1 to 240, Inclusive.)

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of the Territory of Alaska,
Third Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Names and Addresses of Attorneys of Record.

J. H. COBB, Juneau, Alaska, Attorney for Mrs. E. A.
Reed, Plaintiff and Appellee.

R. J. BORYER, Cordova, Alaska, Attorney for
Copper River and Northwestern Railway Com-
pany, a Corporation, Defendants and Appellant.

JNO. R. WINN, Juneau, Alaska, Attorney for
Copper River & Northwestern Railway Com-
pany, a Corporation, Defendants and Appel-
lants. [1*]

In the District Court for Alaska, Third Division.

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO., a Corporation,

Defendant.

*Page-number appearing at foot of page of original certified Record.

Complaint.

The above-named plaintiff, complaining of the above-named defendant, for cause of action alleges:

I.

Plaintiff is the duly appointed, qualified and acting administratrix of the estate of J. E. Reed, decd., and sues herein as such for the use and benefit of herself as the surviving widow, and her two children hereinafter named, as the orphan minor children of the said J. E. Reed, decd.

II.

The defendant is a corporation duly incorporated and doing business as a common carrier by steam railway in the Territory of Alaska, and was engaged in such business at all the times hereinafter mentioned, operating its line of railway from the town of Cordova, Alaska, up the Copper River and into the interior of Alaska.

III.

That on or about the first day of January, 1912, and for some time prior thereto, the said J. E. Reed was in the employ of the defendant as a locomotive engineer, engaged in driving its engines attached to its cars over its road as he might be directed by the defendant, its officers, agents, and vice-principals. That on the date aforesaid, defendant had [2] negligent allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated, so

as to render the same extremely hazardous to the said J. E. Reed, and other employees of the defendant operating its said engines. That on or about the said date, while plaintiff's intestate, in pursuance of the duties of his employment, was driving an engine over defendant's said road, by reason of the unsafe and hazardous condition of said track, said engine was derailed and plaintiff's intestate was killed. That said fatality was due solely to the negligence of the defendant in failing to keep and maintain its roadbed in a reasonably safe condition for the operation of its trains thereon, and without any fault or negligence whatever on the part of the said deceased.

IV.

That deceased at the time of his death was a man in good health, 31 years of age, and earning, and capable of continuing to earn, \$3,000.00 per annum. That he left surviving him this plaintiff, his widow, and two minor children, Verne, aged 7 years, and Kenneth, aged 2 years, who have thereby been deprived of the support and care of a loving husband and father, and said children have been deprived of the education, training and nurture which only a father can give, and said plaintiff has been damaged in the sum of Twenty-five Thousand Dollars.

Wherefore, plaintiff prays judgment for the said sum of \$25,000.00 and costs of suit.

J. H. COBB,

Attorney for Plaintiff. [3]

United States of America,
District of Alaska,—ss.

E. A. Reed, being first duly sworn, on oath deposes

and says: I am the plaintiff above named. I have heard read the above and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

E. A. REED.

Subscribed and sworn to before me this 24th day of August, 1912.

[Seal]

J. H. COBB,

Notary Public in and for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 30, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [4]

In the District Court for Alaska, Third Division.

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Summons.

The President of the United States, to the Copper River & Northwestern Railway Company, a Corporation, Defendant, Greeting:

In the name of the United States of America, you are hereby commanded to be and appear in the District Court for Alaska, Third Division, to be holden at Valdez, in said District and Division, within thirty

days from the date of the service hereof upon you, then and there to answer the complaint of Mrs. E. A. Reed, as administratrix of the estate of J. E. Reed, decd., filed against you in said court, and if you fail to so appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of Twenty-five Thousand Dollars, the amount prayed for in said complaint, a copy of which is herewith served upon you.

And you, the marshal of said District and Division, or your deputy, are hereby commanded to make due service and return of this writ. HEREOF FAIL NOT.

WITNESS the Honorable PETER D. OVERFIELD, Judge of said Court, and the seal thereof affixed at Valdez, Alaska, this 30th day of August, 1912.

[Seal]

ED M. LAKIN,
Clerk.
By V. A. Paine,
Deputy.

Marshal's No. 408. [5]

United States of America,
Territory of Alaska,
Third Division.

I hereby certify that I received the within Summons on the 6th day of October, A. D. 1912, at Chitina, Alaska, and thereafter on the 7th day of October, at Mile 114, I served the same on the therein named defendant, George Geiger, service agent for the Copper River & Northwestern Railway Company, a corporation, by delivering to him a copy of the

Summons, together with a certified copy of the complaint filed therein.

Returned this 8th day of October, A. D. 1912.

H. P. SULLIVAN,

U. S. Marshal.

By J. L. Brown,

Office Deputy.

MARSHAL'S COSTS:

1 Service.....	\$6.00
32 Miles @ 20.....	6.40

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 12, 1912, Ed. M. Lakin, Clerk. [6]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

**Motion to Quash and Set Aside Summons and
Service of Summons and Return of Summons.**

Comes now the defendant, the Copper River & Northwestern Railway Company, and moves the Court that the Summons and the service and return of the Summons in this case be quashed and set aside,

for the reason that the Summons in this action was not returned to the Court or Clerk thereof with whom the Complaint and Summons was filed and issued within forth (40) days after its delivery to the officer or other person for service. This motion is based upon the hereto attached affidavit and files in this case.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 7, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [7]

*In the District Court of the Territory of Alaska,
Third Division.*

#C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Affidavit [of R. J. Boryer].

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That the Summons and complaint in the above-entitled action was delivered by the clerk of this court to the marshal's office in Valdez on the

30th day of August, 1912, for service upon the defendant, and was not served upon the defendant until the 7th day of October, 1912, as is shown by the return and files and records in this case, and the Summons was not returned to this court or Clerk thereof with whom the complaint was filed until the 12th day of October, 1912.

In witness whereof I hereunto attach my hand and seal this the 6th day of November, A. D. 1912.

R. J. BORYER.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 7, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [8]

United States of America,
District of Alaska,—ss.

Before me, a notary public in and for the District of Alaska, personally came R. J. Boryer, to me personally known, who being first duly sworn, stated that he has read the above affidavit, knows the contents thereof and that the same are true.

[Seal] C. M. FRAZIER,
Notary Public in and for the District of Alaska,
Residing at Cordova.

[Endorsed]: Filed in District Court, Territory of Alaska, Third Division. Nov. 7, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [9]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

E. A. REED, as Administratrix of the Estate of J. E.
REED, Deceased,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RAILWAY CO., a Corporation,
Defendant.

Affidavit of S. T. Brightwell.

United States of America,
Territory of Alaska,
Third Division,—ss.

S. T. Brightwell, being first duly sworn, on oath deposes and says: I am the United States Deputy Marshal at Cordova, Alaska. Early in the month of September, 1912, I received from the marshal's office at Valdez, Alaska, the summons in this case for service upon Mr. Geiger, the agent of the defendant company. At that time, Mr. Geiger was out on the road and the railroad was not running trains because of wash-outs, and for that reason there was a delay in the service until about the 7th day of October, when the same was served by Deputy Brown, of Chitina. That Deputy Brown returned said summons to the Clerk's office by mail at Valdez.

That between the 7th day of October, when the service was had and the 12th day of October when the same was returned to the Clerk's office, there was no

mail-boat until about the 11th day of October, by which said summons could be returned to the Clerk's office. And there was no means of returning the summons after service prior to the 12th except by chartering a special boat at great expense, and the said [10] SUMMONS WAS RETURNED AFTER SERVICE AT THE earliest possible moment, by the usual and ordinary means of communication between Cordova and Valdez.

S. T. BRIGHTWELL.

Subscribed and sworn to before me this 23d day of Nov., 1912.

J. H. COBB,
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [11]

*In the District Court for the Territory of Alaska,
Third Division.*

Special November, 1912, Term, Nov. 23—9th Court
Day.

C.—50.

E. A. REED, as Administratrix of the Estate of J.
E. REED, Deceased,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN
RAILWAY CO., a Corporation,

Defendant.

Order Denying Motion [to Quash].

This matter coming on this day to be heard upon the defendant's motion to quash, J. H. Cobb, Esq., appearing for the plaintiff, R. J. Boryer, Esq., appearing for the defendant, and after argument and affidavits of the defendant and the plaintiff being filed, and the same being by the Court considered, the said motion is denied, to which order and ruling of the Court defendant excepts and exception is allowed, and the plaintiff's motion for a change of place of trial is this day withdrawn.

Entered Court Journal No. C.—1, page 356. [12]

*In the District Court for the Territory of Alaska,
Third Division, at Cordova.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RY. CO.,
a Corporation,

Defendant.

Motion for Change of Place of Trial.

Now comes the plaintiff, by her attorney, and moves the Court to grant an order changing the place of trial of this cause from Cordova to Valdez, Alaska, and for cause shows: That the plaintiff cannot obtain a fair and impartial trial before a jury selected from a panel drawn from the town of Cordova and vicinity, as will more fully appear from the affidavits

hereto attached and made a part of this motion.

J. H. COBB,

Attorney for Plaintiff.

Service of a copy of above motion with attached affidavits admitted this the 21st day of November, 1912.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [13]

[Affidavit of J. H. Cobb.]

United States of America,
Territory of Alaska,—ss.

J. H. Cobb, being first duly sworn, on oath deposes and says: I am attorney for the plaintiff in the above-entitled and numbered cause. I have had business in the court at Cordova during the past four years, and during that time have spent a great deal of time in said town. Said town was built by, and is dependent entirely upon, the defendant railway company and its allied corporations; that is to say, the town was started and built as the tide-water terminal of the railway, and there is not as yet any business in said town except what comes either directly or indirectly from the railway company, and everyone in it is more or less dependent upon the said company or its allied companies. That probably one-half of those persons otherwise qualified for jury service would be disqualified by reason of being in the employ of the defendant, or one of its allied companies

under the same management and control. That of the remaining persons subject to jury duty, the great majority have such close business relations with the defendant or some of its allied companies that they would be disqualified by bias from serving, or if they should qualify on their *voir dire*, would in fact be under some sort of duress because of the peculiar conditions that exist. During the past two or three years I have had occasion to inquire into and ascertain as far as practicable the conditions existing at this place in regard to securing fair and impartial jurors in cases in which the railway company was interested. I have talked with many of the residents and business men of the town and asked their opinion, and am satisfied from all the information I have obtained that the plaintiff in this case cannot expect a fair and impartial jury to be had if this case is tried in Cordova. I further state that nearly all the persons who have informed me that conditions are such that a fair and impartial jury cannot be obtained here have declined to make an affidavit to that effect, because, they say, they fear to incur the ill-will of the railway company by so [14] doing. The allied companies referred to above are the Katalla Company and the Alaska Steamship Co., both of which are under the same control as the defendant railway company; and upon these three companies hangs nearly the entire business and welfare of the town of Cordova. By reason of these facts, the defendant has the power, as I verily believe, to coerce at least some of the members of any jury that could possibly be drawn under the law, at this place.

J. H. COBB.

Subscribed and sworn to before me this 22d day of Nov., 1912.

[Seal]

K. L. MONAHAN,
Deputy Clerk of the District Court for the Territory
of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory
of Alaska, Third Division. Nov. 22, 1912. Ed M.
Lakin, Clerk. By K. L. Monahan, Deputy. [15]

[Affidavit of C. P. Mickelson.]

United States of America,
Territory of Alaska,—ss.

C. P. Mickaelson, being first duly sworn, on oath deposes and says: I am a resident of the town of Cordova, Alaska, and have resided here for some five years last past. I have been a member of the City Council of the town of Cordova and have served as jury commissioner. I know the conditions prevailing in and around said town in regard to the probable influences which the Copper River & Northwestern Railway Company or its allied companies would have upon a jury, in a case in which it was interested in said town. The fact that the entire community in and around Cordova is almost entirely dependent for its livelihood and business upon the railway company and its allied corporations has produced a widespread feeling among the people of the community that any act on the part of an individual displeasing to the railway company will result in financial embarrassment and loss or business embarrassments to such person. This feeling is so widespread and general that I am fully satisfied that any jury drawn

from Cordova and its vicinity in a case in which the railway company was interested could be to a more or less extent influenced in favor of the railway company by this feeling. The feeling is such that I believe it will be very difficult to secure a jury at this place in a case in which the railway company is interested, some member of which would not feel more or less coerced in favor of the railway company.

C. P. MICKELSON.

Subscribed and sworn to before me this 21st day of November, 1912.

[Seal]

J. H. COBB,
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [16]

[Affidavit of W. J. Shepard.]

United States of America,
Territory of Alaska,—ss.

W. J. Shepard, being first duly sworn, on oath deposes and says: I reside in Cordova, Alaska, and have resided here and in this vicinity since long before the town was started. I know the situation and conditions existing here with regard to the probable influence which the Copper River & Northwestern Ry. Co. would have over a jury selected from this vicinity in any case in which it was interested. The great majority of the people of this community feel dependent upon the railway company to a greater or less extent, and feel that anything done by them that

might be displeasing to the company would result in financial loss to themselves. This feeling is so strong and general, that I do not believe it hardly possible to get a jury at this place, that, in a case against the railway, would not be influenced by it.

W. J. SHEPARD.

Subscribed and sworn to before me this 21st day of November, 1912.

[Seal]

J. H. COBB,

Notary Public in and for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [17]

*In the District Court of the Territory of Alaska,
Third Division, at Cordova.*

#C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Affidavit of R. J. Boryer.

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That he is attorney for the defendants in the above-entitled action; that the de-

defendants have their place of business at Cordova, Alaska, and all of its officers and officials in the active conduct of the defendants' business resides and are located at Cordova, Alaska; that in the trial of this case it will be necessary to call as witnesses the superintendent and auditor and other men who are in charge of and connected with the defendants' business, that it will work a great hardship upon these defendants if the superintendent and auditor and other officials of the company are required to go from Cordova for the trial of this case, as it is necessary for said officials to be at Cordova at all times in connection with the operation of said road, and it will work a great hardship upon said officials and officers if required to go to some other town for the purpose of testifying in this case; that it will be necessary to call as witnesses in this case the superintendent, the auditor and several of the civil engineers of said road; that by taking these men from Cordova as witnesses it would [18] necessitate the securing of men who are unfamiliar with the work of the road for the operation of same, and possibly be unable to get anyone to take their places during their absence, and by so doing would greatly retard the operation of the road and inconvenience many of the men who are employed on said road who are constantly quitting, drawing their time and in securing their pay.

That this plaintiff is now and was at the time this action was started a resident of Cordova, Alaska, the same as the said defendants herein.

That J. H. Cobb has only tried one personal injury case against the defendants herein in the town of Cordova, Alaska, and in said case he recovered a

large judgment of One Thousand (\$1000.00) Dollars for the plaintiff, which in the opinion of this affiant was excessive.

That this affiant believes and so states that judging from the past cases tried by the plaintiff's attorney and the general feeling and conditions at Cordova, the plaintiff can secure a fair and impartial jury and trial.

R. J. BORYER.

Subscribed and sworn to before me this the 22d day of November, A. D. 1912.

[Seal]

ED M. LAKIN,
Clerk. [19]

*In the District Court of the Territory of Alaska,
Third Division, at Cordova.*

C.—#50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendants.

Affidavit of George Geiger.

George Geiger, being first duly sworn, upon his oath deposes and says: That he is superintendent of the defendant companies in this action; that the operation of the defendants companies' business are managed and controlled by him from the town of

Cordova, Alaska, where the defendants' headquarters are located; that it is necessary for him to be at Cordova at all times in order to operate and superintend the defendants' interests except such times as it is necessary for him to go over and look after the road, and it is necessary that he be in close touch with the operation of said road at all times; that it would work a great hardship on him and the operation of the road and defendants' interests if he were required to leave Cordova for the purpose of attending the trial of this case.

That this affiant has been advised by R. J. Boryer, attorney for the defendants, that it will be necessary to have the auditor of the company, who resides at Cordova, present at the trial of this case; that it is necessary that the auditor of the company located here in Cordova be at his office at all times in order to look after and care for the [20] men who are daily quitting and leaving the road, many of whom take the first boat for Seattle; that if the auditor is required to leave Cordova to go to some other place to attend the trial of this case, it will be necessary to have someone come from Seattle, who is unfamiliar with the business and conduct of the business of the office located at Cordova, and would work a great hardship upon these defendants.

That in the trial of this case it will be necessary to have as witnesses civil engineers and engineers operating the locomotives and rotaries of the line of defendants' road; that by taking away these engineers and auditor it would greatly retard the business and

operation of the trains and work along the line of its road.

That this affiant believes and so states that the plaintiff can secure a fair and impartial trial and can secure and select fair and impartial jurors at Cordova, Alaska.

GEORGE GEIGER.

Subscribed and sworn to before me this the 22d day of November, A. D. 1912.

[Seal]

R. J. BORYER,

Notary Public in and for the District of Alaska, Residing at Cordova, Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [21]

*In the District Court of the Territory of Alaska,
Third Division, at Cordova.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Affidavit [of C. M. Frazer et al.].

United States of America,
District of Alaska,—ss.

We, the undersigned attorneys, residing and prac-

ting law in the town of Cordova, Alaska, each being first duly sworn, on oath deposes and says: That we firmly believe and so state that the plaintiff in the above-entitled action can secure a fair and impartial jury, and that the interests of the defendants companies at Cordova are not in such close business relations with the residents and citizens of Cordova and vicinity that they would be disqualified by bias from serving on a jury, and if they should qualify on their *voir dire* would be under no duress because of the conditions that exist at Cordova and vicinity.

C. M. FRAZER.

J. Y. OSTRANDER.

WM. O'CONNOR.

C. B. GILLESPIE.

Subscribed and sworn to before me this the 22d day of November, A. D. 1912.

[Seal]

R. J. BORYER, [22]

Notary Public in and for the District of Alaska, Residing at Cordova.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy. [23]

*In the District Court for the Territory of Alaska,
Third Division.*

#C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Motion to Make Complaint More Definite and
Certain and to Strike.**

Comes now the defendant by its attorney and moves the Court to require the plaintiff to make the complaint more definite and certain, in that it state when and where and in what State and county the plaintiff, Mrs. E. A. Reed, was appointed administratrix of the estate of J. E. Reed, deceased, as alleged in paragraph 1 of the Complaint.

2.

And that plaintiff either be required to strike out the following words in paragraph 3 of the Complaint: "And otherwise suffered to become utterly unsafe and unfit as a roadbed," or require the plaintiff to state in what way and manner said roadbed was *otherwise* suffered to become utterly unsafe and unfit as a roadbed.

That plaintiff be required to strike out the following words: "And other employees of the defendant operating its said engines," which words are in the

first and second lines of paragraph 3 on page 2 of the Complaint.

R. J. BORYER,
Attorney for the Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 27, 1913. Angus McBride, Clerk. By V. A. Paine, Deputy. [24]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—April 10th—1st Court Day.

C.—50.

Mrs. E. A. REED, as Administratrix,
Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO.,

Defendant.

**Order Denying Motions to Make More Definite and
Certain and to Strike.**

Now, on this day, this matter coming on to be heard upon defendant's motion to make more definite and certain and motion to make more definite and certain and to strike, R. J. Boryer appearing for defendant and motion and J. H. Cobb appearing for plaintiff,

WHEREUPON, after arguments were had and the Court being fully advised in the premises, denies said motion; and

IT IS FURTHER ORDERED that defendant have 5 days to file his answer, or until Saturday, April 12th, to otherwise plead herein. To the above order and ruling of the Court defendant excepts and exception is allowed.

Entered Court Journal No. C. 2, page No. 8. [25]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Demurrer.

Comes now the defendant and demurs to the complaint in this action for the following reasons:

I.

That the Court has no jurisdiction of the subject of the action.

II.

That there is a defect of parties plaintiff.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient

to constitute a cause of action.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 12, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [26]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, Administratrix,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO., a Corporation,

Defendant.

**Order Overruling Demurrer and Permitting to
Amend by Interlineation.**

Now on this day this matter came on to be heard upon defendant's demurrer to the Complaint on file herein; J. H. Cobb appearing on behalf of the plaintiff; R. J. Boryer appearing for defendant, and after arguments had and the Court being fully advised—

IT IS ORDERED that said demurrer be and the same is hereby overruled, and

IT IS FURTHER ORDERED that plaintiff be permitted to amend Complaint by interlineation in this, to wit: By changing "\$1800.00" to "\$3000.00," and substituting "Plaintiff" for "Estate" in paragraph 5 of said Complaint, and

IT IS FURTHER ORDERED that defendant have five days to file his answer herein.

To the above order and ruling of the Court defendant excepts and exception is allowed.

Special April, 1913, Term—April 12th—3d Court Day.

Entered Court Journal No. C.—2, page No. 21.
[27]

*In the District Court of the Territory of Alaska,
Third Division.*

#C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER AND NORTHWESTERN
RAILWAY COMPANY, a Corporation,
Defendant.

Answer.

Defendant answering plaintiff's Complaint says:

I.

Answering paragraph I of Complaint, says it does not have information sufficient to form a belief as to allegations contained therein; therefore denies same.

II.

Answering paragraph II of Complaint, admits allegations contained therein.

III.

Answering paragraph III of Complaint, defend-

ant denies each and all of the allegations contained therein.

IV.

Answering paragraph IV of Complaint, defendant says it does not have information sufficient to form a belief as to the allegations contained therein, therefore denies same.

AFFIRMATIVE DEFENSE.

Defendant for first separate and affirmative defense says:

I.

That if the said J. E. Reed referred to in paragraph III and IV of Complaint was killed, said death was caused by and [28] arose out of and from risks incidental to his employment and business in which said J. E. Reed was engaged and which risks the said J. E. Reed assumed.

Defendant for second separate and affirmative defense says:

I.

That if the said J. E. Reed referred to in the Complaint was killed, said death was caused by the negligence or contributory negligence of said J. E. Reed and of or by the negligence of a fellow-servant and persons working with him.

Wherefore, defendant requests that this action be dismissed and that it be allowed its costs and disbursements in this action.

R. J. BORYER.

United States of America,
District of Alaska,—ss.

I, Caleb Corser, being first duly sworn, deposes and

says: That I am the superintendent of the Copper River & Northwestern Railway Company, defendant named in the above-entitled action, and that the foregoing Answer is true as I verily believe.

CALEB CORSER.

Subscribed and sworn to before me this the 11th day of April, A. D. 1913.

[Seal]

R. J. BORYER,

Notary Public for the District of Alaska.

United States of America,
District of Alaska,—ss.

Due and legal service is hereby accepted this 17th day of April, A. D. 1913.

J. H. COBB,

Attorney for Plff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 17, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [29]

*In the District Court for Alaska, Third Division, at
Cordova.*

C.—50.

Mrs. E. A. REED, as Administratrix of Est. J. E.
REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RY. CO.,
a Corporation,

Defendant.

Reply.

Now comes the plaintiff, by her attorney, and denies all and singular the allegations in the affirmative answers of the defendant contained.

J. H. COBB,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Mrs. A. E. Reed, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have heard read the above and foregoing reply, and the same is true, as I verily believe.

E. A. REED.

Subscribed and sworn to before me this 17th day of April, 1913.

[Seal]

J. H. COBB,
Notary Public in and for Alaska.

Service of the above reply admitted, this April 17th, 1913.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 17, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.
[30]

United States of America,
Territory of Alaska,
Third Division,—ss. .

I, the undersigned Clerk of the District Court, for the Territory of Alaska, Third Division, do hereby

certify that the hereto attached is a full, true and correct copy of the original Order Calling Special April 1913, Term, Cordova, Alaska, Appointing Jury Commissioner, and Fixing Time and Manner of Drawing Trial Jurors for said Term, as same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 28th day of April, 1913.

[Seal]

ANGUS McBRIDE,

Clerk.

By K. L. Monahan,

Deputy. [31]

*In the District Court for the Territory of Alaska,
Third Division.*

In the Matter of a Special Term of Court at Cordova,
Alaska, April 10th, 1913.

**Order [Directing Holding of Special Term of Court
in "Empress Theatre" Building at Cordova,
Alaska, etc.].**

WHEREAS, on consideration, it appearing that a Special April, 1913, term of court should be held at Cordova, Alaska, for the transaction of such business as may arise; now, therefore,

IT IS HEREBY ORDERED that a Special Term of court, Territory of Alaska, Third Division, be held in the "Empress Theatre" Building at Cordova, Alaska; said term of court shall begin on the 10th day of April, 1913, at the hour of ten o'clock A. M., and shall continue as long thereafter as the public busi-

ness may require; and

IT IS FURTHER ORDERED that the Clerk of this court shall give notice of the holding of said Special Term of court, as aforesaid, by posting notices thereof in at least three conspicuous and public places within the town of Cordova for at least thirty (30) days prior to the said 10th day of April, A. D. 1913; and

IT IS FURTHER ORDERED that the petit jury shall be summoned to meet in the "Empress Theatre" Building at Cordova, Alaska, on the said 10th day of April, A. D. 1913, at the hour of ten o'clock of said day; and

WHEREAS, it appearing to the Court that Arthur Lang is a fit and proper person to act as Jury Commissioner, being a citizen of the United States in good standing, a resident of the Territory of Alaska and a well-known member of the principal political faith opposing that of the Clerk of this court; now, therefore, [32]

IT IS ORDERED that Arthur Lang be and he is hereby appointed Jury Commissioner to aid and assist the Clerk of this court in selecting and depositing in the jury-box of this court the names of not less than three hundred (300) qualified men, as prescribed by law, from which the petit jury may be drawn for said Special Term; and

IT IS FURTHER ORDERED, that said Jury Commissioner and Clerk shall, on the 25th day of February, A. D. 1913, at the hour of two o'clock P. M. of said day, deposit in the jury-box of said court the names of not less than three hundred (300) men

as aforesaid; and

IT IS FURTHER ORDERED that the said jury commissioner and said clerk shall immediately thereafter proceed to draw from said jury-box, alternately, as provided by law, and the rules of this court, the name of twenty-four (24) men, having, or believed to have, the necessary qualifications to serve as petit jurors; the names of the first twenty-four (24) men so drawn to constitute said petit jury; and

IT IS FURTHER ORDERED that said drawing of said petit jurors shall take place publicly, in open court, in the courtroom of the courthouse at Valdez, Alaska, on the day and hour aforesaid.

Dated at Valdez, Alaska, this 24th day of February, A. D. 1913.

THOMAS R. LYONS,
District Judge.

[Endorsed]: Entered Court Journal No. 7, page No. 176.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [33]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto attached is a full, true and correct copy of the original Minute Order found at page No. 11, Journal No. C.—2, calling Special Venire for April, 1913, term of court (First Special Venire) as same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 30th day of April, 1913.

[Seal]

ANGUS McBRIDE,
Clerk.

By K. L. Monahan,
Deputy. [34]

[Order Directing Issuance of Special Venire.]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—April 10th—1st Court
Day.

In the Matter of a Special Venire for Trial Jurors
for Attendance at This Special April, 1913,
Term of Court.

WHEREAS, it appearing to the Court that the venire, heretofore issued for trial jurors has been returned and that there are but ten jurors available for service therein and being fully advised,

IT IS ORDERED that a Special Venire issue to the United States Marshal to summon from the body of the District and not from the bystanders twelve men qualified to serve as trial jurors at this Special term of court; said venire returnable at the hour of ten o'clock A. M., Monday, April 14th, 1913.

Entered Court Journal No. C.—2, page No. 11.
[35]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto attached is a full, true and correct copy of the original Minute Order found in Journal C.—2, page No. 24, for Second Special Venire to be summoned from Valdez and Seward as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 30th day of April, 1913.

[Seal]

ANGUS McBRIDE,

Clerk.

By K. L. Monahan,

Deputy. [36]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April Term—April 14th, 1913—4th Court
Day.

In the Matter of a Second Special Venire for Trial
Jurors at This Special, April, 1913, Term of
Court to be Summoned from Valdez and
Seward.

Order [Directing Issuance of Special Venire].

WHEREAS, it appearing to the Court that it is necessary in order to expedite business at this term of court that a second venire for trial jurors issue,

and good cause appearing therefor,

IT IS ORDERED that the Clerk issue a Special Venire directed to the United States Marshal to summon twenty men qualified as trial jurors to be in attendance at this Special term of court; said men, so drawn, shall be drawn by the said marshal from the town of Valdez and Seward, Alaska; said venire returnable forthwith.

Entered Court Journal No. C.—2, page No. 24.

[37]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto attached is a full, true and correct copy of the original order for discharge of first special venire issued at the Cordova, April, 1913, Term of Court, as the same appears on file and of record in my office.

In testimony whereof, I have subscribed my name and affixed the seal of said Court at Valdez, Alaska, this 28th day of April, 1913.

[Seal]

ANGUS McBRIDE,

Clerk.

By K. L. Monahan,

Deputy. [38]

**[Order Excusing Members of First Special Venire
for Term.]**

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—April 24th—13th Court
Day—Thursday.

In the Matter of the Excusing of Trial Jurors
Drawn on the First Special Venire Issued at
This Term of Court.

Good cause appearing therefor,

IT IS ORDERED that all members of the first
Special Venire, issued for trial jurors at this term
of court, be and they are hereby excused for the term.
The names of said jurors are:

- | | |
|--------------------|---------------------|
| 1. M. Finkelstein, | 6. F. H. Estabrook, |
| 2. E. A. Hegg, | 7. R. J. Kennefick, |
| 3. C. M. Berry, | 8. James Smith, |
| 4. E. P. Ziegler, | 9. Chas. Warren, |
| 5. L. G. Belter, | 10. R. R. Stewart. |

Entered Journal No. C.—2, page 52. [39]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

[Minutes of] Trial.

Now, on this day the trial of the above-entitled cause came on regularly for trial, J. H. Cobb appearing as attorney for plaintiff, R. J. Boryer appearing as attorney for defendant, and both parties announcing their readiness for trial, the following proceedings were had and done, to wit:

WHEREUPON, it being the hour of adjournment, and a jury not having been secured to try the issues in this cause, the further trial of said cause is continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. C.—2, page No. 68.

Special April, 1913, Term. April 30th—18th
Court Day—Wednesday. [40]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Exceptions to Jurors.

Comes now the defendant, by its attorney, R. J. Boryer, and respectfully shows that on the 24th day of February, A. D. 1913, this Honorable Court called a special term of court to be held at Cordova, Alaska, on the 10th day of April, A. D. 1913, and on said date April 10th, 1913, ordered that a special jury be summoned for said date pursuant to the laws pertaining to the drawing of jurors, and that in pursuance of said order a petit jury was drawn for said special term, pursuant to said order; said petit jury reported in pursuance to said order, which jury consisted of twelve (12) men; that all of the other names selected for said jury failed to report, a certified copy of order is hereto attached.

That on the 10th day of April, A. D. 1913, this Court issued an order for a special venire for the purpose of completing the regular panel of the petit jury. The men selected and summoned by said special venire being: L. G. Belter, F. H. Estabrook,

Geo. C. Hazelet, R. J. Kennefick, R. R. Stewart, C. M. Berry, M. Finkelstein, E. A. Hegg, A. J. Paxson, James Smith, Chas. Warren, E. P. Ziegler. That the aforesaid jurors selected by the first special venire were duly sworn and served as jurors, a certified copy of the first special venire is hereto attached.

That after the first special venire was issued, the [41] case of Snyder vs. Kelter was on the calendar and ready for trial, and the plaintiff's attorney objected to going to trial with the regular panel and the first special venire; that it was agreed between the plaintiff's attorney and the defendant's attorney, and the Court that a second special venire was to be issued, a certified copy of which order is hereto attached, and the second special venire was to be drawn from and limited to Seward, Alaska, and Valdez, Alaska, for the purpose of trying the case of Snyder vs. Kelter; that after the disposition of this case and on the 24th day of April, A. D. 1913, the first special venire was excused for the term and the names of the jurors on the second special venire from Seward and Valdez were held and used for the purpose of filling the panel of the regular jury.

That the first special venire was summoned and selected pursuant to the laws of Alaska and of the United States; that the second special venire was not selected according to the laws of Alaska and of the United States. Defendant attaches hereto certified copies of orders pertaining to the above jury.

WHEREFORE, defendant requests that the jury in this case be selected from the panel of the regular jury until the jury is completed or the ballots ex-

hausted, and that the names and persons selected in the second special venire be not used or placed in the box to be drawn from in the formation of the jury for this case, for the reason that the second special venire was not issued, in accordance with the laws of Alaska and the United States, and said jurors are selected from two particular places within the Division, namely, Seward and Valdez, and not in accordance with the law provided for selection of jurors.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Angus McBride, Clerk. By Thos. S. Scott. Apr. 30, 1913. [42]

*In the District Court for the Territory of Alaska,
Third Division.*

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned Clerk of the District Court, for the Territory of Alaska, Third Division, do hereby certify that the attached list of names is a full, true and correct list of the names of persons drawn on the first and second special venire for service as trial jurors at the Special, April, 1913, Term of Court at Cordova, in said Territory and Division, as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said

Court at Valdez, Alaska, this 24th day of April,
A. D. 1913.

[Seal]

ANGUS McBRIDE,

Clerk.

By K. L. Monahan,

Deputy. [43]

**First Special Venire Called During April, 1913, Term
of Court at Cordova, Alaska.**

L. G. Belter	Cordova
C. M. Berry	"
F. H. Estabrook	"
M. Finkelstein	"
Geo. C. Hazelet	"
E. A. Hegg	"
R. J. Kennefick	"
A. J. Paxson	"
R. R. Stewart	"
James Smith	"
Chas. Warren	"
E. P. Ziegler	"

[44]

**Second Special Venire Called During Special April,
1913, Term of Court at Cordova, Alaska.**

1. E. F. BellSeward, Alaska,
2. Jos. BourkeValdez, Alaska,
3. Geo. BrownValdez, Alaska,
4. Jas. A. ClintonSeward, Alaska,
5. E. E. Chamberlain...Seward, Alaska,
6. J. M. DaughertySeward, Alaska,

7. Antone EideSeward, Alaska,
8. C. H. GoldenValdez, Alaska,
9. D. P. GriswoldValdez, Alaska,
10. Smith HigginsValdez, Alaska,
11. P. S. HuntValdez, Alaska,
12. Z. L. King.....Seward, Alaska,
13. Jos. LeeValdez, Alaska,
14. G. R. MantheySeward, Alaska,
15. Sam McNieceValdez, Alaska,
16. L. H. PedersonSeward, Alaska,
17. Adam SwanValdez, Alaska,
18. Wm. SouleValdez, Alaska,
19. W. M. TroutValdez, Alaska,
20. Chas. WilcoxValdez, Alaska.

[45]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order Granting Exception to Panel of Trial Jurors.

Defendant having filed its written objections to the formation of the panel of trial jurors prior to proceeding to the trial of the above-entitled cause,

and said objections having been considered by the Court and overruled, defendant by and thru its counsel excepts and exception is duly allowed by the Court.

Special April, 1913, Term—May 5th—22d Court day.

Entered Court Journal No. C.—2, page No. 84.
[46]

[Minutes of Trial (Continued).]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO.,

Defendant.

Now, on this day, the trial of the above-entitled cause came on regularly for trial; J. H. Cobb appearing as attorney for plaintiff; R. J. Boryer appearing for the defendant.

- | | |
|----------------------|----------------------|
| 1. P. S. Hunt, | 7. E. F. Bell, |
| 2. Smith Higgins, | 8. A. S. Jensen, |
| 3. James A. Clinton, | 9. Sam McNeice, |
| 4. Joseph Bourke, | 10. J. M. Daugherty, |
| 5. Joseph Lee, | 11. L. H. Pederson, |
| 6. Z. L. King, | 12. G. R. Manthey, |

were selected and sworn as trial jurors to try the issues in this cause.

WHEREUPON Plaintiff's Exhibits "A" and "B" were offered and admitted in evidence.

WHEREUPON O. L. Larson, Henry Lee, K. E. Holden, and Chas. Kitsman were sworn and testified as witnesses on behalf of the plaintiff.

WHEREUPON it being the hour of adjournment and the testimony of the witnesses being incomplete, IT IS ORDERED that the further trial of this cause be continued until to-morrow, at the hour of ten o'clock A. M.

ENTERED: Court Journal No. C.—2, page No. 69.

Thursday, May 1st, 19th Court Day—Special April, 1913, Term. [47]

[Minutes of Trial (Continued).]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Admx. of the Estate of J. E.
REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; J. H. Cobb

appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for the defendant; came the jury, heretofore impaneled and sworn herein, and being called and each answering to his name, the following proceedings were had and done, to wit:

WHEREUPON Chas. Kitzman resumes the stand and testifies further on behalf of the plaintiff.

WHEREUPON Defendant's Exhibit No. 1 was offered and admitted in evidence.

WHEREUPON Harry N. Wilson, Gus Theil and George Scott were sworn and testified as witnesses on behalf of the plaintiff.

WHEREUPON Harry N. Wilson and Chas. Kitzman were recalled and testified further on behalf of the plaintiff.

WHEREUPON W. J. Bibber was sworn and testified as a witness on behalf of the plaintiff.

WHEREUPON Plaintiff's Exhibits "C" and "D" were offered and admitted in evidence.

WHEREUPON Warren Taylor, Herman Albright and F. R. [48] Townsend were sworn and testified as witnesses on behalf of the plaintiff.

WHEREUPON Mrs. E. A. Reed was sworn and testified as a witness in her own behalf.

WHEREUPON plaintiff rests.

WHEREUPON, it being the hour of adjournment, the further trial of this cause is continued until to-morrow at the hour of nine o'clock A. M.

Entered Court Journal No. C.—2, page No. 71.

Special April, 1913, Term, May 2d, 20th Court Day—Friday. [49]

[Minutes of Trial (Continued).]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED as Admx. of the Estate of J. E.
REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; J. H. Cobb appearing for the plaintiff; R. J. Boryer appearing for defendant; came the jury, heretofore impaneled and sworn herein, and being called and each answering to his name, the following proceedings were had and done, to wit:

WHEREUPON, R. J. De Leo was sworn and testified as a witness on behalf of the defendant.

WHEREUPON, Defendant's Exhibits 2 and 3 were offered and admitted in evidence.

WHEREUPON J. W. Forrester was sworn and testified as a witness on behalf of the defendant.

WHEREUPON Harry N. Wilson was recalled and testified as a witness on behalf of the defendant.

WHEREUPON defendant rests.

WHEREUPON, the plaintiff offering no testimony in rebuttal, defendant files its written motion for a directed verdict, which said motion was by the

Court denied and exception taken and allowed.

WHEREUPON arguments were had by counsel for plaintiff and counsel for defendant, the jury was duly instructed as to the law in the case by the Court, and retired in charge of [50] their sworn bailiffs for deliberation.

THEREAFTER, said jury returning into court, in charge of their sworn bailiffs, and being called and each answering to his name, present, by and thru their foreman, in their presence, in open court, their verdict, which is in words and figures as follows, to wit:

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Admx. of the Estate of J. E.
REED, Deed.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendant and assess plaintiff's damages at Twenty Thousand Dollars (\$20,000.00).

Dated at Cordova, Alaska, this May 3d, 1913,
day of May A. D. 1913.

E. F. BELL,
Foreman.

WHEREUPON, said verdict is ORDERED filed and entered by the Clerk and the jury is excused from further deliberation herein.

Entered Court Journal No. C.—2, page No. 74.

Special April, 1913, Term of Court—May 3d, 21st Court Day—Saturday. [50A]

*In the District Court for the Territory of Alaska,
Third Division.*

[Endorsed]: Filed in the District Court, District of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy.

No. C.—52.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Transcript of Testimony.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard at

Cordova, Alaska, beginning on the 30th day of April, 1913, at 2 P. M. of said day, before the Honorable PETER D. OVERFIELD, Judge of said Court, and a jury:

The plaintiff herein being represented by her attorney and counsel, John H. Cobb, Esq.:

The defendant herein being represented by its attorney and counsel, R. J. Boryer, Esq.:

The jury having been empaneled opening statements were made by Mr. Cobb on behalf of the plaintiff and by Mr. Boryer on behalf of the defendant:

WHEREUPON the following additional proceedings were had and done, to wit: [51]

[Proceedings Had April 30, 1913.]

[Examination of Jurors.]

Examination of Juror Adam Swan.

(Questions by Mr. BORYER.)

Q. What is your full name? A. Adam Swan.

Q. Where do you reside? A. Valdez, Alaska.

Q. When did you arrive in Cordova?

A. On the evening of the 5th, I think.

Q. Have you heard anything of the facts in this case? A. No, sir.

Q. Are you acquainted with the plaintiff in the case? A. I am not.

Q. Are you acquainted with the Alaska Steamship Co.?

A. I know some of them connected with that company.

Q. You know of the Alaska Steamship Co.?

A. I know there is such an institution.

Q. I will ask you if you have not had some difficulty by reason of or through your son, with the Alaska Steamship Co.?

Mr. COBB.—I shall object to that—the Alaska Steamship Co. is not connected with this case.

By the COURT.—Nor with the defendant, as far as we know.

Q. That is what I mean—with the defendant. I will withdraw the question providing that no insinuations are let into this evidence that the Alaska Steamship Co. and the subsidiary corporations are part of this defendant company.

By the COURT.—As far as I know, at least in the case already, there is no occasion for the mention of any subsidiary companies.

Mr. COBB.—I know of none.

Mr. BORYER.—I will withdraw the question then. [53*—2†]

Q. I will ask you if you have any feeling against the Copper River & Northwestern Railway Company. A. I have not.

Q. I will ask you if you have any feelings regarding corporations. A. No, sir, I have not.

Q. I will ask you if you will give the same consideration to this corporation as you would to an individual. A. I would.

Q. I will ask you if you have any feeling against this particular corporation. A. I have not.

Q. Do you know of any reason why you should not

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

sit as a juror in this case? A. I do not.

Q. I will ask you if you believe that people have a right to do business as a corporation and that they are entitled to the same rights and privileges under the law as individuals.

A. I do—I believe they have.

Q. I will ask you if you served as a juror within the last year in this court or in this division.

A. I served—not as a trial juror; no.

Q. What did you serve as?

A. I served on the special venire of the grand jury in Valdez last fall.

Q. You served on the grand jury in Valdez?

A. Last winter.

Q. The last winter—this past December?

A. Yes.

Q. In this court?

A. The court was then at Valdez. [54—3]

By the COURT.—The record will show.

Q. In this division? A. In this division.

Q. Have you served as a juror since then?

A. Not until I came here.

Q. Have you served as a juror prior to that, within the past year? A. I have not.

Mr. BORYER.—I submit a challenge.

Mr. COBB.—We resist the challenge.

By the COURT.—The challenge is overruled.

To which ruling of the Court defendant is allowed an exception.

Examination of Juror W. C. McCall.

(Questions by Mr. BORYER.)

Q. Are you acquainted with the plaintiff in this

case? A. No, sir.

Q. Have you heard anything of the facts of the case? A. No.

Q. Do you know of any reason why you should not sit as a juror in this case? A. I do not.

Q. Have you any bias or prejudice against corporations? A. No.

Q. Have you any against this particular corporation? A. No.

Mr. BORYER.—We pass the juror for cause.
(Questions by Mr. COBB.)

Q. Are you in the employ of the mine at Latouche?
[55—4] A. Yes, sir.

Q. You know, do you not, that the Copper River & Northwestern Railway Co. and that mine are all owned by the same people or practically the same people? A. I have heard so.

Q. That is generally understood, is it not?

Mr. BORYER.—That is just the point I raised a moment ago—I object to the question for the reason that I was not permitted to introduce the identical same question.

Mr. COBB.—Counsel is mistaken. He did not ask if they were owned by the same people; if they are and there are reasons why that would influence him I think it would be a good ground for challenge.

Mr. BOYER.—There is nothing shown that he knows.

By the COURT.—These misunderstandings seem to come up whenever I have any sort of stipulation between the attorneys. You may answer the question.

To which ruling of the Court counsel for defendant is allowed an exception.

Q. Would that fact influence you in any way in arriving at a verdict in this case?

A. It would not.

Q. What capacity are you employed in?

A. In the carpenter business now, at the present time. (Juror passed for cause.)

The panel having become exhausted, with a jury out considering another case—

By the COURT.—Unless the attorneys agree to go on with the jurors we have, I think I will take a recess until the [56—5] other jurors come in.

Mr. BORYER.—I prefer that we have a full jury.

By the COURT.—The jurors who are now in the box will occupy the same position as though you may ultimately be chosen as far as conversation regarding this case is concerned with anybody, and if it should happen the other jury should come in by 4 o'clock, I would like to have you return into court and we will take it up this afternoon; if they do not, we will continue to-morrow morning, but we will adjourn tentatively until 4 o'clock this afternoon.

Mr. BORYER.—I want to take an exception. The defendant excepts to the Court's ruling in excusing the jury, for the reason that the law provides that when the panel is exhausted that the panel shall be filled from the bystanders and that this was not done, in that the jury was excused for the purpose of awaiting the return of another jury that was then considering another case and such jury would not be

from the bystanders as required by law.

Exception allowed.

[Proceedings Had May 1, 1913.]

MAY 1, 1913—MORNING SESSION.

(Jury completed and sworn and opening statements made.)

By Mr. COBB.—Plaintiff first offers in evidence a certified copy of the order appointing the plaintiff administratrix of the estate of J. E. Reed, deceased.

Mr. BORYER.—We desire to object, for the reason that the order is not accompanied by the petition and other papers upon which the order is based, and for the further reason that this is not the proper manner of showing the appointment of an administratrix. **[57—6]**

By the COURT.—In what respect?

Mr. BORYER.—That the records themselves should be shown here.

Objection overruled. Defendant allowed an exception.

The certified copy of order appointing the plaintiff administratrix of the estate of J. E. Reed, deceased, is marked Plaintiff's Exhibit "A," is attached hereto and made a part hereof.

Mr. COBB.—We next offer in evidence a certified copy from the same Probate Court of letters of administration.

Mr. BORYER.—To which we make the same objection.

Objection overruled. Defendant allowed an exception.

Letters of administration marked Plaintiff's Exhibit "B"—attached hereto and made a part hereof.

Mr. COBB.—We will call Mr. Larson. [58—7]

[Testimony—Plaintiff's Case.]

[Testimony of O. L. Larson, for Plaintiff.]

O. L. LARSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. O. L. Larson.

Q. Where do you reside? A. Cordova.

Q. How long have you resided here?

A. A little over five years.

Q. What is your business or occupation in life?

A. I am working for the railroad here, working for the Copper River & Northwestern.

Q. How long have you been in the employ of the Copper River & Northwestern Railway Co.?

A. From the 26th of March, 1908.

Q. Are you in their employ now? A. Yes, sir.

Q. In what capacity? A. Conductor.

Q. Were you in the employ of the defendant company in the month of December, 1911, and January, 1912? A. Yes, sir.

Q. Did you know during his lifetime one John E. Reed? A. Yes, sir.

Q. At the time last mentioned, namely, December, 1911, and January, 1912, did you know where he was employed?

A. He was employed here by the railroad.

Q. The Copper River & Northwestern Railway

(Testimony of O. L. Larson.)

Co.? A. Yes, sir.

Q. In what capacity?

A. He was an engineer. [59—8]

Q. Do you recall a train leaving here, that is, the town of Cordova, to go out over the line of the Copper River & Northwestern Railway on the 31st day of December, 1911? A. Yes, sir.

Mr. BORYER.—I ask the answer be withdrawn—it was answered before I could object. I desire to object to the question for the reason that it is immaterial and irrelevant and not pertinent to the issues in the case. This accident is alleged to have occurred at Mile 75A and it is immaterial as to the operation or running of that train from Cordova up to that point under the issues of the case.

By the COURT.—I have no objection to the question. The objection will be overruled.

Defendant allowed an exception.

A. Yes, sir.

Q. Have you any memorandum made at the time of the time the train left? A. Yes, sir.

Q. Referring to that and refreshing your memory tell the jury what time the train went out from here.

A. The train left here on the 30th of December at one o'clock P. M.

Q. Now, what made up that train?

A. The train I had was—I don't know just how many cars. I will look and see (referring to memorandum book). There was six cars in that train besides the engine.

Q. Begin at the front end of the train and tell the

(Testimony of O. L. Larson.)

jury as near as you can recall what the train was made up of.

A. Made up of the coach, the engine on the head end—

Q. What was the first engine?

A. Engine #102, I believe; next to the engine was a box-car and [60—9] then a gondola flat-car; following that was two box-cars and a coach on the rear.

Q. Carrying out passengers and freight?

A. Yes, sir.

Q. Where was the rotary at the time that that train left?

A. They left some time before I did but I don't know just what time they did leave.

Q. Some time before the train went out?

A. They generally leave before the rotary leaves.

Q. What train were you on? A. On the local.

Q. You were conductor on the local?

A. Yes, sir.

Q. Where did you overtake the rotary?

A. Going up?

Q. Yes.

A. I don't remember just where it was we overtook them.

Q. You did overtake them?

A. Yes, we overtook them.

Q. Was it before or after you passed Bridge 75A?

A. We overtook them before we got there.

Q. Before you got there—then the rotary and the engines pushing it and the local were all along

(Testimony of O. L. Larson.)

close together? A. Yes, sir.

Q. Now, I want you to tell the jury about the rotary and how that was made up—what that consisted of.

A. It consisted of a rotary, two pushers and a ca-boose.

Q. The rotary—what position did it occupy in the train? A. The rotary was on the head end.

Q. Was Mr. Reed anywhere on that train?

A. He was supposed to be on the rotary; yes. [61—10]

Q. He was engineer on the rotary at that time?

A. Rotary engineer.

Mr. BORYER.—We object to that as leading.

Mr. COBB.—From your statement to the jury I understood there *as* no dispute where Mr. Reed was working. I will withdraw that question—I don't want any possible error in this case.

Q. State if you know where Mr. Reed was working at that time.

A. I don't know what part of the engine he was on at that time. He was in the rotary, I suppose.

Q. Do you know what car he was on?

A. He was on the rotary, I suppose, where he belonged.

Q. What time was it, as near as you can tell, that this train composed of the two pusher engines and the rotary reached this bridge?

A. Going up, you mean?

Q. Yes.

A. Some time about midnight. I don't remember

(Testimony of O. L. Larson.)

just what time.

Q. Of what day?

A. That was on the 31st.

Q. The day following the time you left here?

A. Yes, the day following the time we left here.

Q. State whether or not the crews on those trains had been continuously on service, on duty, from the time they left here up to that hour.

Mr. BORYER.—I desire to interpose an objection, for the reason that it is incompetent, irrelevant and immaterial, and it is not pertinent to the issues in the case.

By the COURT.—For what reason?

Mr. BORYER.—For the reason that it has nothing to do with the issues in the case—it tends to prove nothing as to the [62—11] issues raised in the pleadings.

By the COURT.—You probably understand, without going into details, the statute referred to by Mr. Cobb in his statement.

Mr. BORYER.—I understand the statute but I desire to make the objection.

By the COURT.—If that is all you wish to say about the objection it will be overruled and exception allowed.

A. I think they had.

Q. At the time you reached this bridge or trestle did the train stop?

A. I don't remember whether they stopped before they got to the bridge or not,—I think they went over the bridge first before they stopped.

(Testimony of O. L. Larson.)

Q. Now, after they went over the bridge, what happened—what did they do next?

A. If I remember right, they were out of water and had to come back for water.

Q. How far beyond the bridge did they go?

A. I don't remember.

Q. Can't you give the jury some idea?

A. I couldn't say how far they did go.

Q. They did, however, back back to the bridge to get water?

A. Yes, they backed back there either for water or coal—I remember they coaled up back there, this side of the bridge.

Q. About how long as near as you can recall were they on this trestle?

A. I don't remember how long they were there.

Q. Do you know how many engines watered and coaled there? A. I do not.

Q. When they left there where did they go to?

A. They went to 78. [63—12]

Q. What did they do there?

A. Took water and coal there and, I believe, they had dinner there, or lunch.

Q. That was somewhere about what time?

A. I don't remember the time.

Q. Doesn't your record show? A. No, sir.

Q. What is there at 78?

A. A section-house there and water-tank.

Q. When you left there state if you took anybody aboard.

Mr. BORYER.—We object to that as irrelevant

(Testimony of O. L. Larson.)

and immaterial and tends to prove nothing under the issues and pleadings.

Objection overruled. Defendant allowed an exception.

A. I don't remember whether they took anybody aboard the rotary or not—I don't remember picking up anybody myself on the train.

Q. You don't remember? A. No.

Q. What time did you get to Teikhell?

A. 5:45 A. M., January first.

Q. 5:45 A. M., January first—that was the time the local left there? A. Yes.

Q. Is that the end of the line?

A. That is generally the end of the line for a rotary but the local goes through to Chitina.

Q. Did the local go through at that time?

A. No, sir.

Q. You say it was the end of the line for the rotary? A. It is as a rule, yes.

Q. Do you know what the rotary crew were doing after they got [64—13] in? A. No, I do not.

Q. What did you do?

A. Well, I don't remember just what we did do there. If I remember right, there was a train came down from Chitina and we transferred our passengers and baggage and waited for the rotary to get ready to leave again.

Q. What time did you leave there coming back?

A. Four o'clock P. M.

Q. Afternoon? A. Yes, sir.

Q. That was January first? A. Yes, sir.

(Testimony of O. L. Larson.)

Q. When you came back, what engines and cars came back with you?

A. I believe I had one car and a coach besides the engine; that is all.

Q. What engines came back? Just tell the jury what that train, beginning at the front end of it that came back, consisted of.

A. A coach, one box-car, and engine 102.

Q. Anything ahead of the local?

A. The rotary was ahead of them.

Q. What was behind the rotary?

A. Two engines and a caboose.

Q. The same equipment and all that went up?

A. Yes, in the rotary outfit.

Q. The same crew?

A. Yes, the same crew.

Q. Now, how far is Teikhell from the place where you stopped to get water? [65—13]

A. The place we stopped to get water at is Mile 76 and Teikhell is 101, about 25 miles.

Q. Do you know what time you reached this trestle on your return? A. Coming down?

Q. Yes. A. Between 7:30 and 7:35.

Q. In the afternoon—in the evening?

A. Yes, sir.

Q. When you reached that place did anything happen?

A. Yes, we stopped pretty quick, we stopped all at once when we reached there.

Q. You stopped all at once? A. Yes, sir.

Q. Do you know what caused that stopping?

(Testimony of O. L. Larson.)

A. The rotary going through the bridge—over the side of it rather.

Q. What was the first thing that indicated to you that the rotary had gone through the bridge?

A. I didn't know it had gone through the bridge until I got out and looked.

Q. What was the first thing?

A. The train stopping all of a sudden.

Q. You got out then? A. Yes, sir.

Q. Where did you go?

A. Went down towards the head end.

Q. When you got around there what did you find, what did you see?

A. I see the rotary lying there on her side. [65—
14]

Q. Which side? A. The right side.

Q. Is that all you saw?

A. I saw some of the boys come running back and hollering the rotary was in a ditch down there.

Q. Did you go up to it?

A. I started back to the coach then; one of the boys said he wanted an ax there to cut the cab open on the rotary.

Q. Did you get the ax? A. Yes, sir.

Q. And come back with it?

A. I gave it to Jimmy Arnott and he took it back there.

Q. Did you go back at all?

A. Yes, I went back that way.

Q. What did you see?

A. I see them digging around there, trying to get

(Testimony of O. L. Larson.)

Albright out when I got there.

Q. Who was Albright?

A. He was fireman on the rotary.

Q. Did you see him?

A. I didn't see him; no.

Q. Is that all you saw?

A. I saw a lot of men around there working away, chopping away on this cab down there—I saw a lot of the boys working around there, around the rotary, chopping open the cab to see if they could find Reed around there and one or two of them packing the pilot back to the coach, Holden.

Q. Holden was pilot on the rotary?

A. Yes, sir.

Q. And you saw them packing him back?

A. Yes, sir. [67—15]

Q. Did you ascertain what caused the rotary to go through?

A. Someone told me it went through the bridge there and the bridge had been burned.

Q. The bridge had been burned? A. Yes, sir.

Q. Did you see how much of it was burned?

A. No, sir.

Q. After that what did you do?

A. Well, we tried to get communication with the superintendent's office and went to the telephone and Mr. Barry was there I believe at the time and he was talking to the superintendent's office, if I remember right, and we got Mr. Wilson; myself and Mr. Townsend and someone else decided to get out of there as soon as we could on account of stalling—so we

(Testimony of O. L. Larson.)

wouldn't get our trains stalled in there.

Q. Did you get Mr. Reed?

A. No, sir, we didn't get him.

Q. He was left there under the rotary?

A. Yes, sir.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. You say you left here what time, on the morning of the 31st?

A. Left here at one P. M. on the 30th.

Q. On the 30th—1 P. M.? A. Yes, sir.

Q. How far did you go on that day, on the 30th?

A. I don't remember how far we did go.

Q. Did you go as far as Miles Glacier?

A. On the 30th?

Q. Yes. [68—16]

A. Yes, we got that far, I am pretty sure.

Q. Did you go as far as 55?

A. I don't remember.

Q. Where did you eat dinner that night?

A. I don't remember.

Q. Did you stop that night?

A. Well, we made several stops along the road.

Q. Why did you stop?

A. Because we had to stop if the rotary stopped. I suppose they stopped to do a little work on their rotary and one thing and another.

Q. About how many times did you stop?

A. I don't know.

Q. Can't you give us any idea as to how many times

(Testimony of O. L. Larson.)

you stopped? A. I don't know at all.

Q. You didn't reach Bridge 75A until what time?

A. I don't remember just the time we reached there—it was some time between—before midnight.

Q. About midnight the next night I believe you said?

A. Something like that. I believe it was before midnight—it was some time before midnight, if I remember right.

Q. That is 75 miles from Cordova?

A. It is on Mile 76, that bridge is, if I remember right.

Q. Then that means that it is 76 miles from Cordova, the place where you left on the afternoon of the 30th? A. Yes, sir.

Q. Cordova is your starting point? A. Yes, sir.

Q. And that is known as Mile 1, is it not?

A. Yes, sir, Mile 1.

Q. And the line and bridges are numbered by miles from Cordova, [69—17] are they not?

A. Yes, I believe they are.

Q. Then you arrived at Bridge 75A the next night at midnight?

A. I didn't say midnight; some time before midnight—I don't remember just what time it was.

Q. Would you say 9 o'clock?

A. I couldn't say at all.

Q. It was after dark? A. Yes, it was dark.

Q. It was after seven or eight o'clock?

A. It might have been, yes.

Q. What is the usual time or run of your train from Cordova to that point, about how many hours?

(Testimony of O. L. Larson.)

A. That depends on how much snow we find along the line there. Without a rotary or if the conditions are good we make it in four or five hours and from that up to 24 hours; we never can tell.

Q. Four or five hours when you don't have snow to fight?

A. Yes, when everything is clear we can make it in four hours.

Q. That would be your usual running time when you are out fighting snow, would it not?

A. Something like that; yes.

Q. Do you know whether you stopped that night or not, that is, if you stopped your train?

A. We stopped several times along the road I remember.

Q. For what period of time would you say?

A. I don't know.

Q. Why did you stop?

A. We stopped because the rotary stopped—we couldn't go by them.

Q. Why had the rotary stopped? [70—18]

A. I don't know.

Q. Were you fighting snow? A. We were not.

Q. Was the rotary fighting snow?

A. I suppose they were; yes.

Q. I will ask you the weather conditions at that time, on that day, if you know?

A. I don't remember just what the weather conditions were going up.

Q. It was during the stormy season, was it not?

A. Yes, sir.

(Testimony of O. L. Larson.)

Q. Now, I will ask you if it is not dangerous to stop your rotary at any point between Mile 27 and 75 when you have similar weather to what you had that night?

A. If the weather is bad and the snow drifting bad, of course it ain't a very good plan to stop very long at a time.

Q. Is it a good plan to stop a few minutes?

A. You can stop a few minutes all right, but not very long if it is drifting there.

Q. Why is that?

A. It is liable to snow in on you and you can't get a good start very well.

Q. And you are liable to be stalled there and kept there? A. Yes, sir.

Q. That has been your experience with that train over that roadway in bad weather, has it not?

A. Yes, sir.

Q. Then I will ask you if in your opinion it was not necessary that this rotary should be kept going during the hours that it worked on this particular trip?
[71—19]

A. Well, it was necessary to keep it going, yes, as much as they could.

Q. And I will ask you if it was not necessary that your train be kept as close to that rotary as it was possible to keep it, in order to prevent the snow drifting in between you and the rotary and blocking it, blocking your train?

A. We always try to work it that way, yes.

Q. That is your object? A. Yes, sir.

Q. And that is your instructions?

(Testimony of O. L. Larson.)

A. Yes, unless it is storming bad and then we couple together.

Q. Now, then, that is the reason that you took this length of time in reaching Teikhell?

A. On account of snow, yes.

Q. On account of the snow and weather conditions?

A. And running out of water and one thing and another.

Q. You say running out of water. What do you mean by that?

A. The engine getting low on water.

Q. The engines were getting low on water?

A. Yes, they did, several times.

Q. Did you have any place that you could water your engines along the line?

A. Yes, there are different places along the line you can siphon water.

Q. Did you siphon up water at those places?

A. I don't know whether they siphoned it that night or not but I suppose they did.

Q. Now, do you recall if you stopped on Bridge 75A that night on your way to Teikhell, that is, when you first went over the bridge?

A. I don't remember of us stopping on there, the local. [72—20]

Q. If you had stopped there, it was not one of the regular stops, was it? A. No, sir.

Q. If the train had stopped there you would have gotten out to see why it was stopped, would you not?

A. I suppose I would.

Q. You along the line of your duty would do that?

(Testimony of O. L. Larson.)

A. Yes, sir.

Q. Do you recall that you did get out and had occasion to get out because the train stopped?

A. No, I don't remember getting out when they were on the bridge.

Q. You don't remember whether your engine stopped on the bridge?

A. I don't remember whether our engine stopped on the bridge or not.

Q. Do you know whether any other engine stopped on the bridge?

A. I suppose the rotary engine—

Q. I am asking what you know. Do you know if any other engine stopped on the bridge on your way up to Teikhell, when you crossed the bridge the first time? A. No.

Q. You don't know? A. No.

Q. After you crossed that bridge, do you recall where you made your first stop? A. No, sir.

Q. Do you know whether you were at Teikhell?

A. We stopped somewhere beyond the bridge, north of the bridge there.

Q. Approximately how far, about? [73—21]

A. I don't know how far it was.

Q. Would you say a couple of miles?

A. No—we did stop about two miles from there afterwards, yes, 78.

Q. I am trying to get at your first stop after crossing the bridge.

A. I don't know where we stopped first.

(Testimony of O. L. Larson.)

Q. But you did stop? A. We stopped; yes.

Q. Then did you back up? A. We backed up.

Q. When you stopped there, did you inquire why you stopped? A. No, sir.

Q. Did you move your train then, either forward or backward?

A. If I remember right, we backed up after they made the stop there.

Q. How far back did you back?

A. We went south of the bridge there, I forget just how far—it was a place we could unload some coal off a car I had on the train.

Q. You went back south of the bridge—by south of the bridge you mean— A. This side of it.

Q. You recrossed the bridge and came on the side of the bridge toward Cordova, your starting-point?

A. Yes, sir.

Q. Now, then, about how far off of that bridge, off on the side toward Cordova, did you stop your train, approximately?

A. I don't remember just how far it is there.

Q. But you got your train off the bridge?

A. Yes, sir. [74—22]

Q. And you unloaded some coal there?

A. We unloaded some coal; yes.

Q. Where did you unload this coal?

A. We unloaded it on the side, on the snow bank.

Q. Was this coal consigned to anyone, or what was it? A. I think it was company coal.

Q. Bulk coal or sack coal? A. Sack coal.

Q. Is there any section-house there? A. No, sir.

(Testimony of O. L. Larson.)

Q. Why did you unload this coal?

A. We unloaded it for the rotary.

Q. And after you had unloaded this coal, did you remain,—did you let your train remain in the same position? A. No, sir, we backed up again.

Q. You backed further back towards Cordova?

A. Yes, sir.

Q. What was following you as you backed across the bridge toward Cordova? A. The rotary outfit.

Q. Did the rotary outfit come back to the point where you had discharged this coal? A. Yes, sir.

Q. What was done by the rotary at that place?

A. The section men put this coal on the rotary, if I remember right.

Q. How long were you discharging this coal?

A. I don't remember just how long it was.

Q. Have you any idea how much you discharged?

A. Twenty sacks.

Q. Then these sacks of coal that you had discharged were put [75—23] back onto the rotary?

A. I suppose it was,—it was for the rotary.

Q. Now, then, what did the rotary next do, if you know?

A. Went ahead again, as far as I remember.

Q. Do you recall how far? A. No, I do not.

Q. Do you know where it went?

A. It went ahead, I know—I don't know just how far they did go.

Q. Did it go on to Bridge 75A?

A. It went on it; yes.

Q. They went on Bridge 75A? A. Yes.

(Testimony of O. L. Larson.)

Q. Do you know what they did on Bridge 75A?

A. No, sir.

Q. Were you up there at any time? A. No, sir.

Q. While they were stopped there? A. No.

Q. While they were on Bridge 75A where did you have your train? A. Had it in the rear of their's.

Q. Was it at some point where you had moved to after discharging your coal?

A. I don't remember whether we stayed back there or pulled up.

Q. Do you know how far up you pulled?

A. No, sir, I don't remember.

Q. Was your engine on the bridge at that time?

A. I don't remember.

Q. Who was your engineer?

A. Frank Townsend.

Q. Your fireman? A. Jack Terry. [76—24]

Q. How long did you remain at this position, before you moved your train again?

A. I don't remember just how long it was.

Q. About how long would you say, approximately?

A. It might have been two or three hours.

Q. You were two hours?

A. We were two hours, yes—I don't remember just what the time was.

Q. You think it would be around about two hours?

A. It might have been; yes.

Q. What work, if any, did you do during that time, during those two hours?

A. We didn't do any work that I remember of.

Q. Just stayed on your train? A. Yes.

Q. Do you know where the engineer was?

(Testimony of O. L. Larson.)

A. I suppose he was on his engine.

Q. That was his place? A. Yes, sir.

Q. Do you know where the fireman was?

A. On the engine.

Q. Who was your brakeman?

A. We had Jimmy Arnott and George Bibber, I think it was.

Q. Where was your brakemen?

A. They were around the train there somewhere—sometimes one was up at the head and sometimes he would come back at the rear, when we were standing still; one was on the engine.

Q. One was on the engine?

A. I suppose he was. I don't remember where he was at the time. [77—25]

Q. What would he be doing up there?

A. I don't know what he was doing,—sticking around in case something was wanted.

Q. Was there one of the brakemen to the rear?

A. Yes, one of them.

Q. Which one was to the rear? A. Arnott.

Q. As soon as you stopped your brakeman went to the rear of the train?

A. One was back at the rear all the time, unless there was work to do at the head.

Q. Who was that?

A. Jimmy Arnott was in the rear.

Q. Did you take water there?

A. I don't remember of our taking any water there.

Q. I understand, then, that you arrived at Bridge

(Testimony of O. L. Larson.)

75A some time between nine and twelve o'clock of the next day?

A. I don't remember just the exact time it was.

Q. But you spent approximately two hours watering the rotary at bridge 75A and taking this coal?

A. I don't know how long it did consume to do the work there. It might have been two hours and might have been five.

Q. After you started from bridge 75A, I understand you did not get to Teikhell until the next morning at 5:45. Is that correct?

A. That is the way I have got it in my trip-book.

Q. What is the distance from bridge 75A or 76 as you call it to Teikhell? A. About 25 miles.

Q. Then you were at least 5 hours going from this bridge to [78—26] Teikhell?

A. Yes, we were that much anyway. I don't remember how long it was.

Q. In going 25 miles?

A. I don't remember how long a time it was to get there.

Q. Did you run slowly?

A. Well, we didn't run very fast, that's a cinch.

Q. You were fighting the snow?

A. Yes, the rotary was.

Q. Now, when you got to Teikhell, what did you do?

A. If I remember right, I think there was a train down there from Chitina and we transferred our passengers and baggage and mail and whatever we

(Testimony of O. L. Larson.)

had and then waited for the rotary to get ready to return.

Q. Why didn't you go on to Chitina?

A. Because we were ordered to stay there.

Q. Do you know why?

A. I don't know why.

Q. How long were you in transferring your passengers—how many passengers did you bring down, approximately? A. Coming down from Teikhell?

Q. Yes.

A. I don't remember how many there were now.

Q. Quite a number, was there?

A. There was probably a dozen, if I remember right.

Q. Probably a dozen passengers? A. Yes, sir.

Q. Did you transfer your freight?

A. We transferred everything, yes.

Q. Was there any freight?

A. He took the cars I had. [79—27]

Q. You just exchanged the cars then?

A. Yes, took everything that went through, yes.

Q. You pulled up and let them take all the freight-cars you had and you hooked on to their passenger coach?

A. We kept our own coach—took the same coach we had going up.

Q. Just detached your engines—that is, you switched your cars out, hooked on to your passenger coach and then you were ready to leave, were you?

A. Yes, sir.

Q. You didn't get out of there until the next day

(Testimony of O. L. Larson.)

at 4—on that same day, about 4 P. M., as I understand? A. Yes, sir.

Q. About how long did it take you to do this switching? A. What switching is that?

Q. Transferring.

A. I don't remember just how long it did take. I don't know how long it was there.

Q. How long does it ordinarily take to transfer five cars?

A. It don't take long—half an hour probably.

Q. And you figure that is about the time it took you to transfer on this day?

A. I don't think it took any longer than that,—our transferring. I don't think it takes over half an hour to transfer what passengers we had and mail and baggage we had and one thing and another.

Q. Then on your way down from Teikhell to Bridge 75A—you came down in about one hour and three-quarters; is that correct?

A. Something like that,—two hours probably.

Q. Can you give any idea why it required you over five hours [80—28] to go from Bridge 75A to Teikhell going out and only about one hour and a half or three-quarters coming back?

A. Yes, sir, the rotary had fought the snow going up and coming back it was all clear.

Q. Then you were fighting snow from Bridge 75A up to Teikhell—the rotary outfit was?

A. Yes, sir.

Q. Now, when you reached Bridge 75A, your train was suddenly stopped and you left your train and

(Testimony of O. L. Larson.)

came down and found your rotary in the creek?

A. Yes, sir.

Q. Under the bridge at 75A?

A. It wasn't under the bridge, no—it was out to one side of the bridge.

Q. At the point where you had taken water the night before?

A. I don't know whether they took water or not,— I suppose they did.

Q. You saw the rotary? A. Yes, sir.

Q. What was the condition of the weather?

A. I don't know just what the weather was. It seems to me it was blowing and snowing a little at the time.

Q. It was snowing and blowing a little bit at the time? A. Yes, sir.

Q. What creek is that, do you know?

A. I don't know.

Q. Is it a glacier stream?

A. I believe it is, yes—there is a glacier right near there.

Q. Was it frozen over?

A. It was, yes. [81—29]

Q. Were you on the bridge or on the ice that night? A. Yes, I was down near the rotary.

Q. Down near the rotary? A. Yes.

Q. How far was the rotary from the bridge?

A. Not over three or four feet I don't think.

Q. It fell to the right of the bridge?

A. Yes, sir.

Q. At the beginning of the bridge?

(Testimony of O. L. Larson.)

A. Yes, right off the bridge.

Q. Right at the bridge?

A. Right off the bridge, yes.

Q. Did you see any fire there?

A. I did not,—not that I remember of.

Q. Did you look to see what was the cause of the rotary having been derailed there?

A. I see there had been a fire there—the ties were all charred up.

Q. The ties were charred? A. Yes, sir.

Q. Had the rails spread?

A. Why, yes, the rails were spread out, sure—nothing to hold it.

Q. Were the pilings or were any other timbers there burned that you noticed?

A. I didn't notice.

Q. And from what you saw and the conditions of things there you thought that there had been a fire which caused the rotary to overturn?

A. I suppose that was it, yes—the bridge had burned.

Q. Did you see any indications of anything else that might [82—30] have caused the rotary to be derailed there? A. No, sir.

Q. Then, in your opinion that was the cause of the derailment of the rotary? A. Yes, sir.

Q. Now, then, how long did you remain there?

A. I don't remember just how long we were there after the rotary went through, but it wasn't very long.

Q. The rotary went over something like a little

(Testimony of O. L. Larson.)

after seven, I believe?

A. Between 7:30 and 7:35.

Q. You went down and tried to rescue the rotary crew, did you?

A. I started down there; they already had the pilot out of there and one or two of the boys were trying to get Albright out at the time I got down there.

Q. The pilot—who was he? A. Mr. Holden.

Q. Kenneth Holden? A. Yes, sir.

Q. And Albright—is that Herman Albright?

A. Yes, sir.

Q. What position did he hold on the rotary?

A. Fireman.

Q. And you say that Mr. Reed, J. E. Reed, was the engineer? A. Yes, sir.

Q. You did rescue Mr. Holden and Mr. Albright?

A. I did not, myself, personally, no.

Q. You were all working there together?

A. Yes, sir.

Q. Did you rescue Mr. Reed?

A. We did not get Mr. Reed out at all at that time. [83—31]

Q. Why not? A. We couldn't get him out.

Q. You couldn't get him out?

A. No, we couldn't get him out.

Q. Did you try?

A. Yes, we tried, to; yes.

Q. Did you do everything in your power, that you could do?

A. They done all they could, as far as I know.

(Testimony of O. L. Larson.)

Q. Everybody was trying to rescue him?

A. Yes, sir.

Q. You did everything you could do?

A. Yes, sir.

Q. Then you left there what time?

A. I don't remember just what time it was when we did leave there.

Q. Approximately?

A. Probably an hour or two afterwards, I guess—it wasn't much more than that.

Q. Just tell the jury why you could not rescue Mr. Reed.

A. I don't know just why they couldn't—because they couldn't get hold of him, that is all; they didn't know just where he was located under the boiler—under the rotary, rather.

Q. Was the boiler under the water?

A. Part of it was, yes.

Q. But every effort was made that could possibly be made to rescue him, was it not?

A. As far as I know, it was.

Q. You were there in charge of the train?

A. I was in charge of the train I had, yes.

Q. And I will ask you now if you did everything you could to render assistance? [84—32]

A. I did.

Q. Did everybody who was present?

A. Everybody around there did, as far I know—they tried to do all they could.

Q. Then you left there—I understand you to say you decided to get out on account of the storm—the

(Testimony of O. L. Larson.)

weather and the storm?

A. It started snowing, yes, pretty bad and we had to back our train through.

Q. You were without a rotary then, were you?

A. Yes, sir.

Q. And you had a lot of passengers, did you?

A. Yes, we had some passengers.

Q. Where did you go to then with your train?

A. Went back to—went clear to Chitina.

Q. You went clear back to Chitina?

A. Yes, sir.

Q. Why did you go to Chitina?

A. We decided to go to Chitina, after consultation there between Wilson, I, Barry and Townsend, concluded to go to Chitina to get water and coal and everything and wait for orders.

Q. You had a telephone in your car?

A. Yes, sir.

Q. You could communicate with the superintendent's office, could you?

A. Yes, sir, I believe we did that night.

Q. Why didn't you go on down to Cordova with your train? A. We couldn't get over the bridge.

Q. And that is the reason that you did not come to Cordova? A. Yes, sir. [85—33]

Q. You went back to Chitina, and how long did you remain in Chitina?

A. Remained there, I believe, until the 16th day of January.

Q. That was on the first day of January?

A. We got up to Chitina, on the 2d.

(Testimony of O. L. Larson.)

Q. You remained there until the 16th day of January?

A. We were running between Chitina and Teikhell with the mail, that is all, but before we came through to Cordova we staid there until the 16th of January.

Q. Then you would bring mail down as far as what point? A. Teikhell.

Q. How many trips did you make to Teikhell?

A. I don't remember just how many it was now.

Q. Have you your book there?

A. Yes. (Consulting book.) Made a trip on the 4th, on the 5th, 6th, 8th, 12th, 15th.

Q. What did you bring down to Teikhell?

A. Brought mail.

Q. What else?

A. Some provisions, I think it was, we brought down.

Q. For what? A. The camps.

Q. Was there a camp at Teikhell at that time?

A. Yes, sir.

Q. You made your first trip down then—what date?

A. I believe it was on the 4th of January, that is, from Chitina to Teikhell, but clear through we started on the 16th.

Q. When did you say you arrived at Chitina?

A. Arrived there 7 A. M. January 2d.

Q. When did you start out of Chitina the first time after January 2d? [86—34]

A. Started out from there on the 4th.

(Testimony of O. L. Larson.)

Q. Where did you go? A. Went to Mile 98.

Q. Did you go down to the rotary?

A. No, sir.

Q. Did Mr. Forrester come down with you?

A. I don't remember whether Mr. Forrester came down that time or not. It seems to me he did.

Q. Was Mr. Wilson with you on that trip?

A. I don't remember, I believe he was. I think he and Arnott, Jimmy Arnot, the brakeman, were there.

Q. Do you remember Mr. Forrester being on the train?

A. I wouldn't say for sure it was that train or not, but I believe it was.

Q. Do you remember unloading jacks and other equipment? A. Yes, sir.

Q. Why didn't you go on down to the rotary?

A. Couldn't go any further with the train on account of snowslides and snow on the track.

Q. There were snowslides and snow and you couldn't go back to the rotary? A. No, sir.

Q. You didn't have any rotary? A. No, sir.

Q. You seldom have use for your rotary between Teikhell and Chitina, do you?

A. Not very often unless the cuts get filled with snow so it has to be used.

Q. That is the dividing line for the snow belt?

A. Yes, sir.

Q. Then between Teikhell, clear down to Cordova, is your [87—35] snowbelt?

A. Yes, sir, down to Flag Point.

(Testimony of O. L. Larson.)

Q. And you brought Mr. Wilson and Mr. Forrester along with the equipment down as far as Teikhell?

A. Mile 98, I believe it was, at that time.

Q. And *that* that is as far as you go, was it?

A. Yes, sir.

Q. Do you know what became of Forrester and Wilson?

A. I believe they mushed down to where the rotary was, if I remember right. They left the train, anyway.

Q. What became of the jacks and the other equipment that you brought on the train that time?

A. If I remember right, I believe they hauled them down on hand sleds.

Q. That is the reason that you ran that train down, is it not?

A. That—the reason was that we hauled that stuff down as far as we could.

Q. For the purpose of getting it down to the rotary? A. Yes, sir.

Mr. BORYER.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. You spoke about fighting a storm going up, fighting snow. Had you been out on the road a few days before this train started on the 30th?

A. I had, yes. I believe that trip we got as far as Mile 51 or 52—I don't know just where it was.

Q. How long were you getting up there?

A. I don't remember just how long it was.

(Testimony of O. L. Larson.)

Q. Well, approximately?

A. I couldn't say; it might have been 20 or 24 hours. I don't [88—36] remember just how long it was.

Q. Was it that long, about? A. I don't know.

Q. Have you any memorandum showing the length of the time on that trip?

A. I will look and see.

Q. Look at your memorandum there?

A. (Consulting book.) 42 hours on that trip, I believe it was.

Q. What date was that you left here?

A. Left here on the 28th.

Q. Were you out any time before that?

A. Was out on the 26th.

Q. How far did you go that trip?

A. We left Chitina at that time.

Q. How long did it take you?

A. 19 hours that trip.

Q. Were you out before that? A. Yes, sir.

Q. What date? A. 25th.

Q. How far did you go that time?

A. Went to Chitina.

Q. How long did it take you that time?

A. 24 hours, I believe. I have got it here, 24 hours.

Q. (By Juror.) What month is that?

A. December, 1911.

Q. What was the trip next before that?

A. 24th.

Mr. BORYER.—I desire to interpose the same objection I did at first, and would like to have it under-

(Testimony of O. L. Larson.)

stood that instead of encumbering the record and interposing objections all [89—37] the time that I have entered a general objection about the time that was consumed in the running of this particular train at the time the injury happened and all similar trains running over the road, and exception.

By the COURT.—I am perfectly willing you shall have such an exception in that form, if you wish it. I think probably we have gone back far enough.

Q. At the time you left here then on the 30th, did you have any reason to believe that you would get through under 24 hours?

A. No, I did not—you never can tell how long it will take in the snow.

Q. You said something in reply to Mr. Boryer in regard to the section-men loading this coal—where were those section-men from? A. 78.

Q. They were down there to meet the train?

A. They came down there, I believe, yes—they were there anyway.

Q. Do you know whether they went back on the train or not? A. I don't remember.

(By Mr. BORYER.)

Q. How long have you been conductor on this road? A. Tenth of April, 1908.

Q. You have made a number of trips to Chitina?

A. Yes, I have.

Q. During the winter seasons? A. Yes, sir.

Q. I will ask you when you leave Cordova, if you can form any idea as to the time that it will require to run as far as Teikhell, Mile 101? [90—38]

(Testimony of O. L. Larson.)

A. That depends upon conditions—you mean in the winter-time, with snow?

Q. In the winter-time?

A. It is pretty hard to tell how long it will take when you have got snow to handle.

Q. You frequently do make that run in five hours or six hours?

A. Six or eight hours, or ten hours—have made it; yes.

Q. You make it oftener in 6 or 8 hours than you do in any other time, do you not?

A. No, sir, not in the winter-time—not when there is snow to handle.

Q. I will ask you again, if, after you leave Cordova and do get past Mile 27, if it is not necessary for the rotary to keep going in order to keep from being blocked and tied up?

A. Well, if it is storming they had better keep going, yes—if it is storming and drifting.

Q. You had charge of that train that day, did you?

A. Charge of the local, yes.

Q. Why didn't you stop that train?

A. What time?

Q. That night.

A. When the rotary went into the ditch?

Q. No, the day you left here.

A. Stop it where?

Q. Why didn't you stop that night for dinner?

A. I don't remember why we did, or if we did—I don't remember whether we stopped or not.

Q. Why didn't you tie up that night?

(Testimony of O. L. Larson.)

A. We had been running right along all the time following the rotary—as long as they keep working we keep following them. [91—39]

Q. And you were following the rotary?

A. Yes, sir.

Q. If the rotary had stopped, would you have stopped?

A. We would stop if they stopped; yes.

Q. You would have to? A. Yes, sir.

Q. Did the rotary stop?

A. They made several stops along there.

Q. Did they stop for the night?

A. No, they did not stop for the night, that I remember of.

Q. You would certainly remember if they stopped or not?

A. They didn't tie up for rest as I remember of; no.

Q. Now, just tell me what you mean, that you didn't tie up for rest.

A. Stopping your work to go and take a sleep for themselves, that is what I mean by tying up for rest.

Q. While you were moving along where were your brakemen?

A. One in the coach and one up in the engine, as I remember.

Q. What was he doing in the engine?

A. That is where he is supposed to be, the head brakeman.

Q. Where were you? A. Back in the coach.

Q. Then you don't know whether you kept run-

(Testimony of O. L. Larson.)

ning that night or not?

A. We kept going as far as I can remember.

Q. And yet it took you this time to go to Mile 75A?

A. It did; yes.

Mr. BORYER.—That is all.

Witness excused. [92—40]

[Testimony of Henry Lee, for Plaintiff.]

HENRY LEE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Henry Lee.

Q. Where do you reside? A. Cordova.

Q. How long have you resided here?

A. About five years.

Q. What is your occupation?

A. Locomotive engineer.

Q. Where are you employed now?

A. By the Copper River & Northwestern Railroad Co.

Q. How long have you been employed on that road? A. About five years.

Q. How long have you been an engineer on it?

A. Five years; hardly five years, it lacks a few days, I suppose of being five years.

Q. How long, then, have you been an engineer, how long have you followed that vocation?

A. Since 1903.

Q. About ten years? A. Yes.

Q. Were you in the employ of the Copper River &

(Testimony of Henry Lee.)

Northwestern Railway Co. in the months of December, 1911, and January, 1912? A. I was.

Q. Engaged in driving engines from here out over its line of road to the interior? A. Yes, sir.

Q. Could you state approximately how long it would take you to [93—41] take an engine through at that time to Teikhell, in the month of December—to Teikhell. A. No, I could not.

Q. It varied? A. It varied a great deal.

Q. Were you on the train that left here on the 30th day of December, 1911, for Teikhell? A. Yes, sir.

Q. Whereabouts were you on the train?

A. I was running a pusher engine on the rotary.

Q. Was there more than one pusher engine?

A. Yes, sir.

Q. How many? A. There were two.

Q. Which one were you on?

A. I was on the head pusher.

Q. About what time as you recall it did you get out of here?

A. My slip shows we got out of here about 11:45—that was the time it called for. Sometimes we were delayed, though, did not get out until later.

Q. 11:45 of what day?

A. On the 30th of December.

Q. You left, then, some time before the local train that was following you left? A. Yes, sir.

Q. What was there went up with you? Tell the jury, so they will know—you were on the first pusher engine? A. Yes, sir.

Q. There was one following you?

(Testimony of Henry Lee.)

A. Yes, sir. [94—42]

Q. What was ahead?

A. The rotary was ahead and I was coupled in next and another engine behind me, and then the caboose.

Q. Do you know who composed the crew of the rotary? A. I do.

Q. Who were they?

A. There was Reed was the engineer, Holden was the pilot and Mr. Wilson was the conductor, and I was the engineer and my fireman was Theile and Dan Barrett was the engineer on the second pusher and Kitsman was his fireman, and I am not certain about the brakeman that was on for us—I think George Scott was, though.

Q. And Wilson, this gentleman here, who is now trainmaster, he was conductor? A. Yes, sir.

Q. Was that the entire crew?

A. We had a watchman with us.

Q. Do you know who that was?

A. Taylor was his name.

Q. There was a fireman on the rotary, was there not? A. Yes, sir, Herman Albright.

Q. That made up the entire crew? A. Yes, sir.

Q. Were you all on duty when you left?

A. All but the watchman were on duty.

Q. Do you recall getting to a trestle near Mile 76, between 75 and 76? A. I do.

Q. About what time did you reach there, Mr. Lee?

A. Well, we reached there somewhere near 9

(Testimony of Henry Lee.)

o'clock—something after 9 o'clock. [95—43]

Q. What day?

A. It was on January first— Let me see (consulting book).

Q. Look at your memorandum.

A. The 31st of December.

Mr. BORYER.—Will you allow me to see **that** memorandum that you are refreshing your memory by?

The WITNESS.—Yes, sir, you can see it. (Hands to Mr. Boryer.)

Q. That memorandum is a memorandum you made at the time?

A. Yes, sir, just the stubs of my slips.

Q. It is a memorandum made at the time,—such memorandum as all trainmen, engineers and conductors keep? A. Yes, it is just the stubs.

Q. You reached there some time you think about 9 o'clock on the 31st?

A. Some time after 9 o'clock. I think it was between 9 and 10.

Q. Between 9 and 12?

A. Yes, it wasn't as late as 12 o'clock.

Q. But you are certain it was between those limits? A. Yes, sir.

Q. Now, tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova? A. Yes, sir.

Mr. BORYER.—I object to that—make the same objection.

(Testimony of Henry Lee.) ¹

Objection overruled. Defendant allowed an exception.

Q. Now, when you reached there I want you to tell the jury just exactly what was done by the train in regard to stopping, coaling, etc. Tell just what was done at that bridge.

A. In the first place, we passed the bridge, went over the bridge and got stalled at Mile 77 in a snow drift. Reed ran out of water on the rotary and he came back and asked [96—44] me if I could spare any water out of my engine, from my tank, and I told him I thought I could, and I went back and measured my water and told him I could give him a little, and I went down and took some hose down and started to connect up the hose to siphon water from my tank, and it took more water hose to reach his tank, so I went back and got the water hose off of Barrett's engine to couple them up, and when we tried to use it I found that his hose was frozen up, and in the meantime the section-man came up from 78 and he asked about the water, where we could get water, and he told us we could get plenty of water back at 75A. We were in doubt about it, we didn't think we could get it, but he told us we could and we went back there to get water.

Q. And you backed there for the purpose of getting water? A. Yes, sir.

Q. What was done when you got back there?

A. We backed on to the bridge and connected up our hose and siphoned water.

Q. To what engine? A. To the rotary engine.

(Testimony of Henry Lee.)

Q. Any other? A. I don't think so.

Q. The others had plenty at that time?

A. Had enough to make 78.

Q. How long were you getting this water?

A. I should think about an hour or a little more.

Q. During that time where was the rotary and the hog engines that were pushing—I believe you call them hog engines? A. Some do; yes.

Q. Where were the rotary and the hog engines with reference to [97—45] the bridge,—were they on it or off of it?

A. They were on the bridge, standing near the north end of the bridge, the rotary was.

Q. Then after you got this water siphoned into the rotary, what did you do—the next thing?

A. We backed up south of the bridge and took on some coal that had been thrown off the local.

Q. Thrown off the local for the rotary?

A. Yes, sir.

Q. After that, what was the next thing done?

A. We proceeded on to 78.

Q. You pulled up and went on by the bridge?

A. Yes, sir.

Q. And went up to 78? A. Yes, sir.

Q. And you left this bridge—Did you see any section-men around?

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial and does not tend to prove anything along the issues of the case.

Objection overruled. Defendant allowed an exception.

(Testimony of Henry Lee.)

Q. Did you see any section-men around?

A. I did—at the time we were there, not when we were leaving.

Q. At the time you were there you saw some?

A. Yes, sir.

Q. You didn't see any when you were leaving?

A. No.

Q. You don't know whether they remained there or not? A. No, I do not.

Q. Do you know anything about any ashes being cleaned from [98—46] any of the engines there?

A. I didn't see any ashes.

Q. You didn't see any ashes? A. No.

Q. At the time did you hear anything said about it? A. I did.

Q. Tell the jury what it was.

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial and not the best evidence.

Objection sustained.

Q. When you got up to 78, what did you do?

A. We stopped there and had supper and coaled up in the meantime, coaled up the rotary—we took on more coal.

Q. Then where did you go?

A. Went on to Teikhell.

Q. What time did you reach Teikhell, about?

A. I don't remember the time we reached Teikhell. My slips show we tied up at 9 o'clock, quit work at 9 o'clock that night.

Q. That is, if you got in there at 5:45, as shown by Mr. Larson's slips, you were on duty up to 9?

(Testimony of Henry Lee.)

A. 9 A. M., I should say—not 9 at night, but 9 in the morning.

Q. What time did you leave there?

A. We were called for one P. M. but we left later on,—we didn't leave that soon. How late I don't remember.

Q. You don't remember that it was 4 o'clock—your slips don't show?

A. No, my slip doesn't show what time we were leaving.

Q. What time did you go off duty and go to rest there? A. 9 o'clock.

Q. But you didn't keep any memorandum of the time you pulled [99—47] out?

A. No, I did not.

Q. (By JUROR.) Was this 9 o'clock in the morning of the 31st? A. Of January first.

Q. Now, when you left, what time did you get back to this bridge?

A. Near 7:30—I didn't look at the exact time.

Q. Did anything happen then?

A. Yes, sir, the rotary just turned over on the bridge.

Q. Did you see it go over? A. I did.

Q. Did your engine go over? A. No, sir.

Q. About what speed had you been running on that return trip?

A. Oh, seven or eight or nine miles an hour—you mean when we struck the bridge?

Q. Yes.

A. Somewheres along seven or eight or nine

(Testimony of Henry Lee.)

miles an hour.

Q. Not running very fast? A. No, sir.

Q. Did you get out of your engine? A. I did.

Q. Now, just tell the jury what you did and what you saw there, of this accident.

A. I was looking out and noticed the rotary make a lurch, and I set the air, tried to stop, thinking the rotary was off the track, and by that time the wheels had struck the bad track and it tipped over. I got off the engine as quick as I could and started down there and happened to think I didn't have a light with me, and went back to the cab to get a light and go back there, and I got a torch and started with it and it blew out. [100—48]

Q. Proceed.

A. And I went back and got a lantern and went down there and I found the fireman with his leg partly buried up with coal. He was standing up and I helped dig on him a while and quite a number got around and I see I couldn't do anything to help him any, and I went around to see what had happened to the other fellows, and they were taking Holden out, out of the pilot-house, through the window, and after we got those boys out, why we began to hunt for Reed—look for Reed.

Q. Did you find him?

A. No, I didn't find him—one of the boys got hold of his hand.

Q. Where was he?

A. He was under the engine and the cab roof was lying over—we were working in between the cab

(Testimony of Henry Lee.)

roof and the top of the engine, feeling around for him, and one of the boys got hold of his hand, about two feet under water—about 18 inches, not two feet.

Q. Could you get him out? A. No, sir.

Q. Now, Mr, Lee, you have been on a rotary quite a while? A. Yes, sir.

Q. And have driven the engine on them?

A. Yes, sir.

Q. Now, I want you to explain just what the crew of the rotary consists of and where they stay and how it is built, so that the jury will have some conception of it.

A. Well, the engine is all housed in, about the same as a locomotive only housed in, a cab built over the entire length of it. How was that question?

[101—49]

Q. Just describe it to them. What the crew consists of and where each one stays, and how the house on it is constructed with reference to the place where each man's duties call him.

A. It is housed in, a cab the entire length of it. The pilot is up in front; he transfers the signal by bell from the pilothouse to the engineer. The engineer stands on the right-hand side, about the centre of the engine and the fireman is at the rear of the boiler.

Q. These three constitute the crew?

A. Yes, sir.

Q. Now, tell the jury whether or not the engineer can see out at all.

(Testimony of Henry Lee.)

A. Why he can, out of a window right alongside of him.

Q. Can he see ahead?

A. No, he couldn't see ahead.

Q. State whether or not the compartment where he stays is separated from the compartment of the fireman.

Mr. BORYER.—We object to that as leading.

Objection overruled. Defendant allowed an exception.

A. Well, there is a long alley-way from him to the fireman—it is not exactly separated from him, I shouldn't say.

Q. What sort of an alley-way is that?

A. It is just about that wide (indicating)—runs alongside of the boiler, between the cab and the boiler, back.

Q. From where he is you can't ordinarily see the fireman? A. No.

Q. Is there a door in that alley-way?

A. I am not sure whether there is a doorway in that or not,—I don't think so. [102—50]

(12 o'clock. Recess until 2.)

AFTERNOON SESSION.

Continuation of the Direct Examination of HENRY LEE.

(By Mr. COBB.)

Q. I believe you stated this morning that you were unable to get Mr. Reed out from under the rotary—you reached that point in the testimony.

A. Yes, sir; I believe so.

(Testimony of Henry Lee.)

Q. When the rotary went off, did you go around in front—when the rotary went off the track?

A. Yes, I was around in front of the rotary.

Q. How soon after the accident?

A. Probably ten or fifteen minutes.

Q. Now, I want you to tell the jury if you observed the track, what was the matter with it?

A. Why, the ties and the top stringers were burned under the rail, on the right-hand side as you come south.

A. On the right-hand side as you came this way?

A. Yes, sir.

Q. That would be the west side of the track?

A. Well, I don't know the directions. I suppose—yes, you would call it the west side of the track.

Q. When you were going up on that train, the rotary and the two pusher engines were going up and stopped at this trestle; do you know anything about any fires being cleaned there or ashes taken out?

A. Well, I heard them cleaning the fire, that is, I heard them talking of it. I didn't see them cleaning it.

Q. Did you hear them cleaning it?

A. No, I heard them say they would clean the fires.
[103—51]

Q. Was the fire still burning when you got back there in front, on the trip down?

A. Yes, there was a slight fire.

Q. About how much of that track, on the right-

(Testimony of Henry Lee.)

hand side of the track, as you come this way, had been burned?

A. I didn't go by the bridge. I should judge from where I looked at it it would be thirty or forty feet. I didn't go over to see it, though.

Q. Thirty or forty feet. Was the entire track burned, or just one side? A. Just one side.

Q. That was the right-hand side, as you came this way? A. Yes.

Q. What kind of a pan was there under the rotary—ash-pan? A. It was a hoe-pan.

Q. I want you to explain to the jury what you mean by a hoe-pan?

A. Sometimes they are self-dumping—you use a lever to dump. In some you shake the ashes down and have to hoe them out from the rear or side; this rotary was a hoe-pan, hoed out from the side.

Q. To which side of the engine on the rotary would you pull the ashes with the hoe when you cleaned it?

A. You would pull them to the right side.

Q. (By the COURT.) What do you mean by right side?

Mr. COBB.—The right side of the rotary.

By the COURT.—Right side, which way?

The WITNESS.—The right side of the rotary; the rotary was headed north, and we were going north and it would be the right side of the rotary. [104—52]

(By Mr. BORYER.)

Q. Do you mean on the opposite side from the side that you spoke of that you saw the fire?

(Testimony of Henry Lee.)

A. On the opposite side?

Q. Yes. I understood you to say as you came down the ties were burned on the right-hand side?

A. Coming down.

Q. And do you mean to say that you would pull your fire out on that same side from this rotary?

A. Going up we would pull it out on the opposite side.

Continuation of Direct Examination.

(By Mr. COBB.)

Q. So if the ashes were pulled from the rotary, and they were the ashes that set fire to it, the opposite side would have been the one that was burned?

Objected to. Sustained.

Q. Would there have been any difficulty or any reason that you know of in cleaning out those engines at any other place at that time, except on the trestle?

Mr. BORYER.—We object to the question as calling for a conclusion, irrelevant and immaterial, and does not tend to prove anything as to the fire at that particular point.

Mr. COBB.—The testimony of the witness is this. These men had been on duty there at that time according to the testimony now in, for 32 hours. Mr. Boryer had stated to the jury in his opening statement that they had orders not to dump on the bridges, not to clean the fires on the bridges; there was a reason why somebody disobeyed that, and it ought to go to the jury.

By the COURT.—I think I will allow it.

(Testimony of Henry Lee.)

Defendant allowed an exception to the ruling.
[105—53]

Q. State, if you know, if there was any reason that made it particularly difficult to clean fires with this sort of ash pan at any other place.

A. The snow was deep on the side of the track, and you would have to dig out the snow on the side to get down and take out the pan.

Q. Would that condition exist on the trestle?

A. No, sir.

Q. I want you to give the jury some idea, if you can, approximately of the condition of the snow on each side of the track, how it lay on each side of the track and whether it was hard or soft.

A. Well, I should judge it was three and a half to four feet deep along there after you got off the bridge and other places deeper, but from, I think, $3\frac{1}{2}$ to 4 ft. deep, maybe deeper, and came right up alongside of the rotary, that close (indicating), where you would have to dig out considerable, and would naturally have a crust where the head of the rotary would be forcing against the snow; it would be rather hard digging right close to the track.

Q. So was it possible to clean that engine, the ashes out of that hoe-pan, without first digging out that hard crust of snow, unless you cleaned them on the trestle? A. No, not very well.

Q. How long had you known John E. Reed at the time of his death? A. I think about two years.

Q. Did you work with him?

A. Part of the time, yes, sir.

(Testimony of Henry Lee.)

Q. What sort of a man was he? [106—54]

A. In what way do you mean?

Q. I want you to tell the jury what sort of a man John E. Reed was.

By the COURT.—With reference to what?

Q. With reference to his being industrious and capable as an engineer, his habits of industry, sobriety, etc.?

A. Well, he was an industrious, good engineer, considered a good engineer, capable, and a good, honest, square man, as far as I knew him.

Q. A man of sobriety and good habits?

A. Why, I have seen him take a drink, but I have never seen the man full.

Q. You never saw him under the influence of drink? A. No, sir.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. How many years have you been an engineer?

A. About ten years.

Q. Did you ever work on any other road before you came here? A. Yes, sir.

Q. What road did you ever work on?

A. Worked on the Great Northern.

Q. How long did you work on the Great Northern?

A. From '98 up to the time I went to work here, a few months before I went to work here.

Q. How long would that be?

A. About nine years, I believe—let me see, yes, about nine years.

(Testimony of Henry Lee.)

Q. On what division were you running? [107—55] A. Cascade Division.

Q. How long did you run on the Cascade Division?

A. I ran about four years, on the Cascade Division.

Q. Were you connected with the rotaries in any way?

A. Yes, I had pushed the rotaries—been called to run one a little bit.

Q. You never ran a rotary?

A. I ran one a little; yes.

Q. How long did you run a rotary?

A. A very short time—we cleaned up the yard.

Q. At one time? A. Yes.

Q. About how long would it take you?

A. A couple of hours.

Q. Then that is the extent of the experience you had operating a rotary? A. Yes, sir.

Q. All the other time you spent there you were an engineer?

A. Yes, sir. I have run a rotary a short time, relieving someone else there on the road, but not called out to run a rotary, except this one time in the yard.

Q. How long did you say you were in getting from Cordova to Mile 75A?

A. From 11:45 in the morning until about 9 o'clock at night—the next night it was.

Q. You were on duty all that time? A. Yes, sir.

Q. Do you know if any of the other crew was on duty? A. Yes, sir; we were all on duty.

Q. What were they doing?

A. Working—bucking snow. [108—56]

(Testimony of Henry Lee.)

Q. Why did it take you so long to make this trip?

A. Heavy snow.

Q. And then you reached ridge 75A and crossed it, did you? A. Yes, sir.

Q. And how far beyond Bridge 75A did you go?

A. Well, I should judge we went about a quarter of a mile past the 76 mile board—I think it is about a quarter of a mile on to 77.

Q. The snow was hard, and you had trouble in getting through it, did you? Is that the reason it caused you so much trouble?

A. We were not having trouble. It was heavy snow—we were going right along, though, but making slow time.

Q. You were working all that time continuously, bucking snow—you want the jury to understand that you were working continuously bucking snow during that time?

A. I think from 52 up it was continuous, but from here to 52 I think it was not very heavy, but further on it was.

Q. Then most of your time was consumed from 52 up, was it? A. Yes, if I remember right.

Q. You remember it, don't you?

A. Well, it is a little bit vague in some places, because we had several hard trips at the time, and I don't exactly remember that trip, in particular.

Q. You do remember when you started out and you remember when you reached your destination,—you remember what time you reached Bridge 75A, do you?

(Testimony of Henry Lee.)

A. Yes, sir; somewhere near the time. I couldn't state exactly the time.

Q. Now, just refresh your memory a little bit, and see if you [109—57] were not doing something else besides bucking snow, from the time you left here until you reached 55, and if most of your time was not consumed between Cordova and 55—do you recall anything else?

A. No, I cannot, because there was several hard trips there, as I stated, and I wouldn't state positively about just where we were at certain times.

Q. Do you remember your rotary breaking down?

A. I do. I remember our rotary breaking down. We had two rotaries break down something about that time.

Q. Don't you remember on that particular trip your rotary broke?

A. I don't know for certain whether it was that particular trip or not. I know either that trip or the trip before the rotary broke down.

Q. Let us confine ourselves to this trip. Don't you know that your rotary broke down at Mile 52?

A. We had a rotary break down at Mile 52.

Q. What did you break at that time?

A. We broke the quarter shaft and knocked out a cylinder head.

Q. It was the rotary you were taking out that day, was it not?

A. I think it was, if that was the trip. I am not positive about that, but I think it was the trip.

Q. Do you mean to say you would have an accident

(Testimony of Henry Lee.)

like that, and wouldn't recall it?

A. Yes, this far off. I remember the trip all right. I remember breaking the rotary and returning to 39.

Q. Then it was on that trip, was it not?

A. I am not positive whether it was that trip or not, but I am rather under the impression it was.

[111—58]

Q. Now, think a little bit further and see if you cannot recall positively that it was?

A. Yes, I think it was.

Q. You broke your quarter shaft at Mile 52 and blew out a cylinder-head, is that correct?

A. And knocked out a cylinder-head.

Q. On this same trip, on your trip up?

A. Yes.

Q. Now, after you did that, what was your next step—about what time was that?

A. Well, I don't have any idea what time that was.

Q. You left here that morning about 11:45, didn't you? A. Yes, sir.

Q. At 4:30 of that same afternoon you were at Mile 52, were you not?

A. I don't know whether it was that early or not.

Q. About that time, wasn't it?

A. Perhaps so, I couldn't say positively—I don't remember the time.

Q. Within two or three hours you think it was that time? A. Yes, probably.

Q. It was somewhere around four or five o'clock.

A. Yes.

(Testimony of Henry Lee.)

Q. Could you proceed any further with your rotary? A. Yes, we returned to Mile 39.

Q. You returned to Mile 39? A. Yes, sir.

Q. Did you turn the rotary or did you back down there? A. We backed there.

Q. You backed down to Mile 39? [112—59]

A. Yes.

Q. How long did it take you to get back to 39?

A. It wouldn't take us over an hour, or an hour and a quarter to come back.

Q. Why did you return to 39?

A. We returned there because there was a water-tank there and to wait for the other rotary to come up and relieve us.

Q. This rotary was in such a condition that you couldn't use it? A. No, sir.

Q. Then you got back there between 6 and 7 o'clock with your broken rotary, did you?

A. I don't hardly think it was that early.

Q. You got back about 8:30, didn't you?

A. Probably that time.

Q. Why did you go back to 39 to wait for the other rotary?

A. Well, they gave us orders to go back there. I don't know exactly why we did go but there was a water-tank there and they sent us there, I presume, so we could get water for our engines.

Q. When you got to 39 what did you do?

A. Wilson and I helped Reed take down one side to get in shape to return to Cordova with.

Q. To return it to Cordova? A. Yes, sir.

(Testimony of Henry Lee.)

Q. Did you turn your rotary? A. Not yet.

Q. You had taken it back to 39—backed it back there? A. Yes, sir.

Q. Was there any place to turn it at 39?

A. No, we had to turn it at the glacier, Mile 49.

[113—60]

Q. You passed the place where you have to turn it? A. Yes, sir.

Q. And came back to 39 and stopped and stayed at 39?

A. We stayed there, yes, until another rotary came.

Q. When did another rotary come?

A. Some time along in the morning. I don't remember what time.

Q. Do you know the approximate time?

A. No, I couldn't say.

Q. It returned there about 3.30 in the morning, did it not? A. Probably some time near that.

Q. Now, Mr. Lee, will you just tell the jury what happened and what you were doing there that consumed your time.

A. Well, the most of the time we were lying waiting for the other rotary to come up, and while we were doing that Wilson and I were helping the engineer turn the rotary wheel, so that the engineer could take down one side and be able to run the wheel with one engine, one side of the engine, to go back to the glacier and turn around and that rotary then to come to town alone.

Q. Then you and Wilson and Reed worked on this

(Testimony of Henry Lee.)

rotary up until the time that the other rotary came, did you?

A. Not all the time; no, sir. We helped him do that and it was an hour and a half or two hours, I suppose, we were sitting there waiting,—I don't know how long Reed was working, but I quit after a while and he was still working after I quit and went back to my engine.

Q. Did Wilson stay there with him?

A. I don't know whether he stayed there or not.

Q. When you got back to your engine where was your fireman? A. On the engine. [114—61]

Q. What was he doing?

A. Sitting there, waiting,—doing nothing.

Q. Do I understand you that you were trying to repair this rotary so that it could be brought back to the terminal or the shops to be repaired?

A. Yes, sir.

Q. Then you had a breakdown with that rotary?

A. Yes, sir.

Q. And you were trying to get it back to the shops so that it could be repaired? A. Yes, sir.

Q. That was the largest rotary you had at that time? A. Yes, sir.

Q. You had one more rotary known as the small rotary? A. Yes, sir.

Q. You waited there until the small rotary arrived and then where did you connect with the small rotary?

A. We went to Mile 49, Miles Glacier, and we changed rotaries there,—took the small rotary and

(Testimony of Henry Lee.)

they returned with the large rotary to town.

Q. When you were fixing your rotary at 39 you were fixing it so that it would be able to fight any snow that it might encounter coming from 49 into the shops? A. Yes, sir.

Q. What time did you start out from Mile 49 with the small rotary?

A. I don't remember what time it was.

Q. Wasn't it about 6 o'clock in the morning?

A. It probably was. I don't remember the time.

Q. And you had arrived at Mile 54 at about 8:30 in the morning, had you not, or Mile 55, commonly called the Abercrombie [115—62] Canyon?

A. About 8:30 in the morning?

Q. Yes, about 8:30 in the morning?

A. I don't remember the time we did arrive there. I can't remember that time.

Q. You do remember you left early the next morning, though, to continue with the small rotary up the line? A. Yes, sir.

Q. And you reached Bridge 75A between 9 and 12 o'clock, you think? A. I think so.

Q. You crossed that bridge and went beyond the bridge with the rotary and the two pushers and the local?

A. Well, I am not certain about the local, but I think it followed us right up to where we got stalled.

Q. Was right behind you? A. Yes.

Q. Where did you make your first stop after crossing Bridge 75A?

A. On Mile 77, in a heavy snowdrift.

(Testimony of Henry Lee.)

Q. Mile 77—what part of 77?

A. On the south end, I should judge, about a quarter of a mile up—about a quarter of a mile on the south end of 77.

Q. Did you stop then?

A. Yes, sir, we stopped there a while.

Q. How come you to stop?

A. Well, we were in a heavy snowdrift and the engineer came back after we stopped and said we were short of water.

Q. What engineer was that? A. Reed.

Q. The engineer of the rotary? [116—63]

A. Yes, sir.

Q. Then what took place?

A. He asked me if I could spare any water from my engine. I told him I would go back and see, and I went back and measured the water in my tank and told him I thought I could give him some, told him I thought I could give him enough to get to 78, the water-tank, and I began to get the hose down to connect up, to siphon water from my tank to his rotary, but we found out that the extra hose that we got off the other pusher was frozen up and during the time we were trying to get that broke loose the section-men came and informed us we could get water back at the bridge.

Q. And then what did you do?

A. We returned to the bridge, backed up.

Q. You backed up—your train would be ahead of you, would it? That is in coming back,—you backed towards Cordova, then?

(Testimony of Henry Lee.)

A. The train was behind us.

Q. Therefore your train would be backing down ahead of you? A. Yes.

Q. You backed down to where?

A. Bridge 75A.

Q. Now, when you got to Bridge 75A, did your local go over the track, across the bridge?

A. Yes, sir.

Q. About how far would you say?

A. Well, I didn't notice how far over they were.

Q. Your rotary was on the bridge, was it?

A. Yes, sir.

Q. And where was your engine?

A. Right behind the rotary, coupled into the rotary. [117—64]

Q. Was your engine on the bridge? A. Yes, sir.

Q. How about the other pusher behind you?

A. I think they were on the bridge too.

Q. Do you know?

A. I am not positive, I didn't get off; I didn't go back that way at all. It was night and I didn't go back there.

Q. Did you get off of your engine at all?

A. Yes, I was on the ground a few minutes. Most of the time I was on my engine.

Q. You were on the ground a few minutes?

A. Yes, sir, a few minutes.

Q. How did you get on the ground?

A. Climbed out on the trestle and jumped over on to the ground.

Q. You climbed down off of your engine and

(Testimony of Henry Lee.)

jumped on to the trestle—did you jump down on to the ice then? A. Jumped down into the snow.

Q. Was that snow over the creek? A. Yes, sir.

Q. You don't know whether the other engine was on there or not?

A. No, I couldn't say positively whether it was.

Q. Are you certain you didn't have your fireman clean his pan on that bridge? A. Yes, sir, I am.

Q. Why do you know that? Why are you certain?

A. He was sitting up there on the seat most of the time we were there.

Q. While you were there? A. Yes.

Q. When you were out—you say you were out a while—don't you [118—65] think that he cleaned his fire, cleaned his pan, while you were out?

A. No, sir, I do not. I was standing right alongside of my engine and I would have seen him if he had.

Q. You didn't give him any instructions to clean it? A. No, sir, I did not.

Q. Wouldn't he clean it without instructions?

A. Sometimes; yes.

Q. Then you don't know but what he cleaned it there then, without instructions?

A. I am positive he did not clean it there.

Q. As a matter of fact, don't you know, or do you know whether you gave him instructions to clean his pan on that bridge? A. I know I did not.

By the COURT.—What is your answer?

A. I did not give him such instructions.

(Testimony of Henry Lee.)

Q. Where had you cleaned your pan on that trip?

A. I don't remember where was the last place. I don't think we had cleaned our pan since we left 55. I have an idea we cleaned the pan at 55.

Q. You are the engineer of that engine?

A. Yes, sir.

Q. Isn't it your duty to know what goes on on that engine? A. It certainly is.

Q. And wasn't it your duty to know whether you cleaned your pan at 55 or not?

A. A small matter like that I might overlook now. I probably noticed him clean it at the time but I don't remember now whether he cleaned it then or not.

Q. It is your duty to know what goes on on that engine? [119—66] A. Yes, sir.

Q. It is your duty to know whether he did clean his pan or not?

A. Yes, it is my duty to see that he cleans his pan when it needs it.

Q. And you are certain that you did not clean your pan except at 55?

A. I can't say that he cleaned it at 55,—I don't remember the circumstance.

Q. That is just because you don't recall?

A. I don't recall the time; no.

Q. You usually saw him when he did it?

A. It takes him some time and I usually saw him, because he can't do it in a few minutes.

Q. How long does it usually take?

A. Sometimes it takes twenty or thirty minutes to hoe out a pan and clean the fire.

(Testimony of Henry Lee.)

Q. Then you think you would see him?

A. Yes, sir.

Q. It is your duty to see him?

A. It is always my duty to see that he does it and see that he doesn't turn his grates and see that he is careful where he dumps his cinders.

Q. And whether he puts his fire out?

A. Yes, sir.

Q. It is your duty to see that as an engineer, is it not? A. Yes, sir.

Q. Who was your fireman that day?

A. Gus Thiele.

Q. Why would you clean your pan at 55?

A. If it was necessary to clean it we would clean it—if the pan got too full we would have to clean it wherever it was [120—67] necessary.

Q. Whenever it was necessary? A. Yes, sir.

Q. Is that the point where you usually clean your pan?

A. Well, some firemen do and others do not. Sometimes we make an entire trip without cleaning the fires, a light trip.

Q. But when you do clean your pan, you usually try to clean your pan at a point where you have water, do you not?

A. Yes, at times. Other times we will clean it where we are stopping for something or other, waiting for orders and knowing we will be there thirty or forty minutes, we will clean it.

Q. What do you do about putting your fire out?

A. Turn the hose on.

(Testimony of Henry Lee.)

Q. Turn the hose on from your engine?

A. Yes, sir, or shovel it off or something—shovel it off the track if we can.

Q. Why do you do that?

A. To keep it from catching the ties,—to keep it from burning the ties.

Q. What would be the effect if you burned the ties?

A. That is destroying company property—ties cost money.

Q. Is it liable to derail a train?

A. Yes; if there was enough ties burned it might derail a train; it is liable to derail a train if there are too many ties burned; the track is liable to spread.

Q. Is that the reason you did not clean the pan of your engine on bridges?

A. That is liable to burn the bridge out.

Q. Are you certain that your engine did not set fire to that [121—68] bridge?

A. Yes, sir, I am.

Q. You did not clean your fires on the bridge?

A. No, sir, I did not clean mine.

Q. You did not give any instructions to your fireman to clean them on there? A. No, sir.

Q. And you are certain he did not clean them on there?

A. I am certain he did not clean them.

Q. You worked on the Great Northern how many years? A. Since 98.

Q. Did you ever work on any other road besides the Great Northern? A. Yes, sir.

Q. What other road?

(Testimony of Henry Lee.)

A. Worked on the narrow gauge Pacific Coast Company railroad between San Luis Obispo and Los Angeles, California.

Q. I will ask you if it is not against the rules and regulations of any and all railroads that you ever worked on to clean your pan on bridges?

A. Yes, sir.

Q. I will ask you as an experienced engineer, if you do not consider that it is extremely hazardous and dangerous to the equipment of a road and to the traveling public to clean fires on a bridge?

A. Yes, I think it is hazardous.

Q. Extremely so? A. Yes, sir.

Q. You say that while you were stopped on this bridge that you heard some conversation regarding the cleaning of the pan of the rotary? [122—69]

A. Yes, sir—not cleaning the pan, cleaning the fire, I said.

Q. Between whom was this conversation?

A. I don't know who it was conversing at all. I was up on my engine at the time and heard some one talking. I couldn't tell who it was.

Q. You are certain it was not your fireman?

A. No, sir—it was up forward of my engine.

Q. It was forward of your engine?

A. Yes. I was sitting up on the top of my engine turning some hose on to siphon water when I heard the conversation.

Q. What was forward of your engine?

A. The rotary.

Q. Who was on the rotary?

(Testimony of Henry Lee.)

A. Well, I don't know just who was on the rotary.

Q. You had been working, pushing that rotary, for about two days, hadn't you?

A. Yes, but I wasn't on the rotary and it was dark. I don't know whether there was a soul on the rotary or not at the time.

Q. There must have been somebody there to have this conversation?

A. There was around there, there was quite a number of men—I couldn't say who they were—around the siphon hose and the water hose.

Q. Who would naturally have such a conversation regarding the rotary?

By the COURT.—That is argument.

Q. Who had charge of that rotary?

A. Mr. Reed.

Q. Who was Reed's fireman?

A. Herman Albright. [123—70]

Q. Then you backed down to this coal-pile out there that Conductor Larson had discharged from his train—what did you do down there?

A. We took some coal on for the rotary.

Q. Then you proceeded toward Teikhell, did you?

A. Yes, sir.

Q. About how much water did they take on to the rotary at that time, do you know?

A. No, I don't know how much water they took.

Q. They were working there about how long?

A. Well, as near as I can remember we must have been there an hour,—close to it.

Q. Were they taking water during this hour, the whole time?

(Testimony of Henry Lee.)

A. About the whole time we were there I think we were taking water, except when we were taking coal.

Q. I mean on the bridge—did you see them taking water?

A. Well, I could see down and they called “All right” to me when I turned on the siphon. I was at the steam valve to turn on the steam, to siphon the water with my engine.

Q. Did you have to break the ice in order to get this water?

A. I think they used the steam hose for thawing the ice, to get down to the ice.

Q. About how thick was it?

A. I didn’t go down to see how thick the ice was.

Q. About how wide was the stream?

A. I don’t know how wide the stream was.

Q. Approximately?

A. I should think there was quite a stream of water there in the summer-time—in the winter-time I don’t know.

Q. How much was there at that time? [124—71]

A. There was a good deep stream of water there. The section boss said it was a couple of feet deep but he didn’t know how wide it was. The section boss told us there was a couple of feet of water there; we only had a small hole through the ice to get the siphon into—we couldn’t see how wide it was.

Q. What side of the engine did you stand on when you were there—your engine was facing Chitina, was it not? A. Yes, sir.

Q. What is your side of the engine?

(Testimony of Henry Lee.)

A. The right side, going up.

Q. Your fireman then is on the left side?

A. Yes, sir.

Q. Were you standing at your post of duty during this time? No, sir.

Q. Where were you?

A. I was up on top of the engine.

Q. You were up on top of the engine?

A. Yes, sir, up at the steam dome, turning on the steam.

Q. How long were you up there?

A. I was there ten or fifteen minutes. I would go out occasionally and come back in—I don't know. I made a couple of trips out there on top of the engine and then came back into the cab. I came back in a couple of times.

Q. Did you see Mr. Holden while you were there?

A. No, sir.

Q. Did you see Albright while you were there?

A. I don't think I did.

Q. Did you see Mr. Reed while you were there?

A. No, sir.

Q. You were there for about an hour? [125—72]

A. I should judge so.

Q. And you didn't see either Holden, Reed or Albright?

A. Not to recognize them—I must have seen them. There was quite a number of men out on the right-hand side of the engine but I couldn't tell who they were because it was dark.

Q. How far from you were they?

(Testimony of Henry Lee.)

A. Probably 20 ft. off the side, that is, forward of me, on the side of the engine. Probably ten feet out from the track and 20 ft. forward of me,—somewhat nearer.

Q. Was it dark? A. Yes, sir.

Q. You had no conversation with Holden, Albright or Reed during that time?

A. Not that I remember.

Q. About how high is the rails of that bridge from the creek?

A. Probably some places it would be 10 ft., the most, I should judge.

Q. You would say about ten feet?

A. I should think so, or almost,—I never looked very closely to see.

Q. You have passed that bridge hundreds of times?

A. Yes, sir,—I have passed a number of bridges.

Q. It is your duty as an engineer to know about your bridges, is it not?

A. Not to know the height of the bridges.

Q. To know the condition of them, etc.?

A. Yes.

Q. You don't know whom this conversation was between? A. No, I do not.

Q. You don't think it was between a couple of the section-men? [126—73]

A. I don't think that it was. I couldn't say who it was between.

Q. Then you went over this bridge, about what time did you say, toward Teikhell?

A. Well, probably ten o'clock or a little later, we left there.

(Testimony of Henry Lee.)

Q. Ten o'clock at night?

A. It was later than that, I should judge.

Q. You got back to Teikhell about 5 o'clock in the morning, didn't you?

A. My time shows that we tied up at 9 o'clock in the morning. I don't know what time we got there.

Q. What do you mean by your tying up?

A. That was the time we quit work.

Q. You got in there a little after 5?

A. It must have been 5 o'clock, probably. I couldn't swear to what time it was.

Q. After you got in there, what work did you have to do then?

A. I had to help turn the train around and turn the rotary around but I don't remember what work we did do at that time.

Q. You say you had to help turn the train around?

A. Get around the loop.

Q. In what way did you help to turn the train around? A. Shoved it around the loop.

Q. Shoved the rotary around the loop?

A. Yes, sir.

Q. She wasn't coupled on to the train? A. No.

Q. Then you took the rotary around the loop?

A. What I call a train—a rotary is a train as far as that is concerned—that is the reason I called it a train.

Q. I want to distinguish between that and the local train—[127—74] A. Yes, sir.

Q. Then you took your train or your rotary around the loop? A. Yes.

(Testimony of Henry Lee.)

Q. And how long do you think it took you to go around the loop?

A. I don't know for certain whether we took it around the loop at that time or not. I should judge we did.

Q. If you didn't take it around the loop, what else did you have to do there?

A. I don't remember what we did that trip. Sometimes it takes a couple of hours thawing the ice and snow off my engine when I get through, on hard trips. I might have had to do that after I got through. I don't remember whether I did or not on this particular trip.

Q. You generally take care of your time on those trips? A. Yes, sir.

Q. And you put in your time? A. Yes, sir.

Q. I will ask you if you will refer to the memorandum you referred to a while ago and ask you if that gives you information as to what time you got there?

A. No, it does not.

Q. I will ask you if it gives you information as to what work you did there? A. No, sir.

Q. Then, as a matter of fact, you don't know whether you did any work there? A. No, I don't.

Q. If it shows that you reported as having arrived there at 5:45 in the morning, would you say that that was correct?

A. No, I couldn't say that that was correct, because I don't [128—75] remember it.

Q. You couldn't say that it was wrong either?

A. No, I couldn't say it was wrong.

(Testimony of Henry Lee.)

Q. You don't know? A. No.

Q. But you counted your time until 9 o'clock?

A. Yes, sir.

Q. From 9 o'clock on—what time did you leave there?

A. We were called for one o'clock, one in the afternoon—we didn't leave until later. I don't remember how much later.

Q. Your time shows that you were paid from one o'clock, does it?

A. Yes, sir—we were on duty at that time.

Q. What, if any, work would it be necessary for you to do before leaving there?

A. Well, the only work I would have to do would be to oil my engine around—it would take fifteen or twenty minutes perhaps.

Q. Who looked after your engine and kept your steam up while you were there?

A. The watchman.

Q. As a matter of fact, you didn't leave there until 4 o'clock, did you?

A. I heard Mr. Larson make that statement but I couldn't say what time we did leave there.

Q. The only work you had to do from the time you arrived there at 4 o'clock in the morning until four that evening was to oil your engine, so far as you know and cut some ice off your engine?

Mr. COBB.—We object to that—they didn't arrive at 4; they arrived at 5:45. [129—76]

Q. Then from 5:45 until 4:15, when you left there, you had nothing to do except to oil your engine, which took you from 15 to 20 minutes, and possibly get

(Testimony of Henry Lee.)

some ice off your engine? And you don't know whether you did that or not?

A. I don't know that morning, no—sometimes it takes me two hours or two hours and a half to get the ice off.

Q. Where was your fireman during this time?

A. I don't remember whether he was on the engine all the time or not.

Q. You don't know where he was?

A. I don't remember whether he was on the engine all the time or not.

Q. Was he on the engine any of the time?

A. Yes, sir, he was on the engine part of the time.

Q. What was he doing on the engine?

A. Well, I don't know just what he was doing—only firing the engine, keeping the engine alive.

Q. I thought you had a watchman there for that purpose.

A. There is a watchman generally to take care of the engines after we get off duty. When we were not off duty our fireman is supposed to be there, and as long as he is on duty the watchman don't have to be around.

Q. Were you still coupled to the rotary?

A. As far as I remember, yes.

Q. Do you say you were or were not?

A. I wouldn't say because I am not certain—they may have uncoupled for some reason or other.

Q. Was there another engine coupled to you?

A. Yes, sir.

Q. Where was Mr. Barrett and his fireman on the

(Testimony of Henry Lee.)

engine that [130—77] was coupled to you?

A. I don't know where he was. I suppose he was on his engine.

Q. Did you see him? A. No.

Q. Did you see his fireman? A. No.

Q. You don't know where they were?

A. I don't remember seeing them.

Q. I will ask you if you saw Mr. Holden?

A. I don't remember whether I did or not.

Q. Did you see Mr. Reed? A. I couldn't say.

Q. Did you see Albright?

A. I couldn't say whether I did or not.

Q. Did you see Mr. Wilson?

A. I couldn't say whether I saw him or not. I may have seen him.

Q. Wilson was conductor of your train, your crew?

A. Yes, sir.

Q. And who was your brakeman?

A. I think George Scott was our brakeman.

Q. Did you see him?

A. I don't remember whether I did see him or not. I have forgotten that.

Q. Were you back in the caboose while you were there? A. Yes, sir.

Q. What time did you go back to the caboose?

A. I don't remember that. I don't remember what time I arrived at the caboose.

Q. Where did you sleep that day?

A. In the caboose. [131—78]

Q. Who was sleeping in there with you?

A. All the crew are supposed to sleep in there.

(Testimony of Henry Lee.)

Q. How is that?

A. All our crew is supposed to sleep in the caboose.

Q. Who slept next to you?

A. That I don't remember.

Q. Do you know who slept in the end of the caboose, below you? A. No, I do not.

Q. Do you know if there was anyone in there sleeping?

A. Yes, there was somebody in there, I know, but who it was, I don't know.

Q. Don't you know that Reed was in there sleeping? A. No, I do not.

Q. Don't you know that Scott was in there sleeping?

A. No, I am not positive about that, but he must have been in there, because we tied up there for a while, and they must all have been in there sleeping, but I don't remember.

Q. They must all have been in there sleeping then?

A. Part of the time—they must all have had a nap there.

Q. But you don't know?

A. I don't remember the circumstance at that time, at that particular time.

Q. But you are positive you heard a conversation about cleaning the fires, are you? A. Yes, sir.

Q. You know that is a fact, don't you?

A. Yes, I do.

Q. Now, then, you returned and came down as far as Bridge 75A? A. Yes, sir. [132—79]

Q. And what is the first you knew of this accident?

(Testimony of Henry Lee.)

A. The first I knew of the accident I saw the head-end of the rotary give a lurch like it had gone off the track.

Q. You saw it give a lurch?

A. Yes, sir; a lurch to the right, and I thought it was off the track.

Q. Were you standing at your post at the time you saw it go?

A. I was not standing. I was sitting on my seat-box, with my head out of the window.

Q. What were you doing with your head out of the window? A. Looking out, watching ahead.

Q. That is one of your duties, is it? A. Yes, sir.

Q. As an engineer,—to be constantly on watch?

A. Yes, sir.

Q. Were you on a straight piece of track just before you got to the bridge? A. Yes, sir.

Q. Now, then, on what side of the rotary would Mr. Reed be on, in coming back to the bridge toward Cordova,—the same side you were on?

A. Yes, sir.

Q. Was it a dark night? A. No, sir.

Q. Light?

A. It wasn't so very light, but it wasn't real dark.

Q. It wasn't a dark night? A. No.

Q. Was it snowing?

A. Yes, it was snowing some. [133—80]

Q. Very much?

A. No, I don't think it was very heavy.

Q. About how much snow did you have on the track coming down?

(Testimony of Henry Lee.)

A. I don't think we had very much snow along there.

Q. Was your rotary working? A. Yes, sir.

Q. Which side was she throwing the snow?

A. She was throwing snow to the left.

Q. You had just gone up there a short time before—had it been snowing from the time you left?

A. I don't know whether it had been snowing all the time or not.

Q. There was a very light snow on the track?

A. There was a light snow.

Q. How far is it from your engine, from where you were sitting on your engine, to the end of the rotary, the head-end of the rotary?

A. 60 or 80 ft., I suppose.

Q. Could you see that far?

A. Yes I could see the rotary,—I could see the hood.

Q. How much further could you see ahead?

A. I could not see ahead very much further on account of the snow flying out on my side.

Q. I understood they were throwing the snow to the left? A. Yes, sir; they were.

Q. On the opposite side?

A. Lots of loose snow will fly from the wheel out to the right. No matter which way it throws it, some will fly the other way.

Q. And it is difficult for you to see?

A. Yes, sir. [134—81]

Q. Was it snowing at the time?

A. I think it was.

(Testimony of Henry Lee.)

Q. A heavy snow?

A. No, I don't think it was a heavy snow, if I remember right.

Q. Your eyesight is good, is it not? A. Yes, sir.

Q. About how far would you say you could see ahead of the rotary?

A. Well, I don't know that I could see ahead of the rotary at all when the snow was flying up there, unless there was just an opening, just a flash once in a while.

Q. Now, then, the rotary fell to the right,—it was derailed and fell over into the creek?

A. Yes, sir.

Q. What did you do when you saw that?

A. As soon as it tipped over, I jumped off of my engine and started down to the rotary and then I turned before I got there, turned and went back and got a light and started down the second time, went down there.

Q. Who went with you?

A. By that time I think Mr. Wilson had got there or some of the men there beat me to the rotary and we started in to get Herman Albright out.

Q. And you first got Albright out, and then Holden?

A. No, I didn't get him out. There was quite a number got around him and was digging him out, digging the coal from around him, and I left him and went over just in time to see them getting Holden out. They had taken an ax and broke into the side of the rotary and were helping Holden out.

(Testimony of Henry Lee.)

Q. You helped do this work, did you? [135—82]

A. I helped with Herman a while, helped dig the coal away from him, but after they got so many around there, I went to look around to see where the other boys were.

Q. What other boys? A. Holden and Reed.

Q. Did you find Holden?

A. Yes, they were just taking him out of the window when I got over there.

Q. And that left Mr. Reed, the engineer?

A. Yes, sir.

Q. Did you make an effort to get him out?

A. Why, we felt around for him, tried to find him.

Q. Who do you mean by we?

A. The boys that were there. Wilson was one of the men that was there, and I remember distinctly Jack Terry and I. One of the firemen was in there, crawled alongside of the cab, inside the cab on the side of the boiler and was hunting for Mr. Reed.

Q. Did you get him out? A. No, sir.

Q. Why didn't you get him out?

A. He was fast under the boiler; we couldn't get him out,—as far as we could tell, he was fast. We couldn't tell whether he was under the boiler or not. Terry got hold of his hand, or claimed he did—I didn't take hold of him. He said, "I have got hold of his hand." He reached down in the water the length of his arm and said he had hold of his hand.

Q. And did you do everything you could to get him out? A. Yes, sir, as far as we could.

(Testimony of Henry Lee.)

Q. You put forth all the efforts you could think of and do?

A. Well, Mr. Wilson and Mr. Larson and the rest of them went back [136—83] to the caboose and consulted what to do.

Q. Were you with them?

A. I was in the caboose part of the time, yes, and I heard part of the conversation.

Q. Did you do everything you could do to relieve him?

Mr. COBB.—I don't want to object to having all the facts brought out, but it seems to me that this is a useless waste of time. The jury knows, and everybody knows, that these boys did everything they could to get this man out—I think it is a fact nobody disputes—and I object to it as a useless consumption of time.

By the COURT.—Let him answer the question.

A. Yes, we done all we could think of.

Q. But you couldn't get him out?

A. No, sir.

Q. Now, then, what time did you leave there?

A. We were probably there an hour, maybe more.

Q. About an hour, and maybe more? A. Yes.

Q. Did you take part in this consultation?

A. No, sir.

Q. You were one of the engineers there, were you?

A. Yes, sir.

Q. Had charge of an engine? A. Yes, sir.

Q. As part of the crew attached to that rotary?

A. Yes.

(Testimony of Henry Lee.)

Q. Did you hear the conversation?

A. I heard part of the conversation, as to what they should do.

Q. Do you know what was the conclusion of that conversation? [137—84]

A. Yes, they concluded that it was best to go back to Chitina if they could get there.

Q. For what purpose?

A. So as to get the passengers back to Chitina, in case they ran short of provisions or anything. They were not very well provided at 78 with provisions, and it was a small crew there, and it was a poor place to keep the passengers.

Q. Then this consultation was for the purpose of deciding on where you could get something to eat?

A. No, and also coal and water for the engine,—get where we could get coal and water for the engine.

Q. Don't you know that that consultation was for the purpose of seeing what they could do to get Mr. Reed released from his engine—wasn't that the main thing?

A. Well, that was decided also. After they decided about that, they concluded they couldn't do anything about getting the body out, and they went back to Chitina.

Q. For jacks and such other equipment as they might use in handling that rotary?

A. What I heard, the main part was getting the engine back and the passengers back—that was the part of the conversation I heard.

Q. But you didn't hear all the conversation?

(Testimony of Henry Lee.)

A. I didn't hear all the conversation; no.

Q. You were not one of that crew and not interested in what was going on?

A. I was interested, but I was down around my engine—part of my engine was off the track, and I was getting my engine on part of the time.

Q. You were interested in your engine?

A. Yes, sir. I might answer that question more fully, too, to [138—85] come to think about it. There was two boys hurt there that they were in a hurry to get back to the doctor.

Q. That is Holden and Albright?

A. Yes, Holden and Albright—they were in a hurry to get them back to the doctor.

Q. Then it wasn't so much to get back in order to get something to eat?

A. No, that was not the main thing, the main point.

Q. Now, then, you say you knew Mr. Reed for about two years? A. As near as I recollect, yes.

Q. He had been working here for the company for about two years?

A. Something like that; if I remember right.

Q. There is where you first met him?

A. I met him here on the Copper River.

Q. Had you ever worked with him on the rotary?

A. Not only pushing the rotary—he was running the rotary, and I was pushing the rotary.

Q. About how often had you worked with him on the rotary?

A. Why, I had only worked a short time with him on the rotary; he had been outside and came back and

(Testimony of Henry Lee.)

had only been working a short time, if I remember right.

Q. Well, he was here for about two years, wasn't he? A. Yes.

Q. You knew him during that time, didn't you?

A. I knew him, yes; met him and was acquainted with him.

Q. What was he doing during that time?

A. Runing an engine, different places and times.

Q. Running the rotary?

A. Running a locomotive and running a rotary at the time of the accident, and a while before. [139—86]

Q. He was a competent engineer?

A. Yes, sir, considered so.

Q. Familiar with the road? A. Yes, sir.

Q. A careful man?

A. As far as I know, yes.

Q. Industrious, wasn't he? A. Yes, sir.

Q. And one of our most capable engineers, wasn't he? A. Considered so.

Q. Had you ever been pusher for him before?

A. Yes, sir, I had.

Q. About how often?

A. I don't know. I don't remember how often. I had pushed the rotary before on former trips for him.

Q. In that particular winter, do you recall about when the rotary began running? A. No, I do not.

Q. Some time in November, wasn't it?

A. I think so.

Q. About the 15th of November, wasn't it?

(Testimony of Henry Lee.)

A. I couldn't say what date it was.

Q. But some time during the month of November?

A. I think it was.

Q. You were running out as pusher behind that rotary on each of its trips, were you?

A. Well, all but two or three trips, I think, that winter I pushed the rotary—I lost a couple or three trips, I think.

Q. Reed had been on it every trip, had he?

A. No, sir; Nettleton was on for a while, Price Nettleton.

Q. Between Nettleton and Reed—those were the only two that [140—87] were operating the rotary?

A. One trip, I remember one trip that John Fillingier was running the rotary.

Q. One trip you recall he ran it and how many trips did Nettleton run it?

A. He was on a couple of trips I remember of,—I don't remember how many more.

Q. Reed ran it the rest of the trips, did he?

A. Yes, he was supposed to be the regular man on the rotary. He was an older man than Nettleton and relieved him when he came back from Seattle.

Q. He was a careful, competent man?

A. As far as I know.

Q. Hadn't you ever seen him clean his ash-pan along the line? A. No, sir, I had not.

Q. You had been pusher behind him each time, had you not? A. Yes, sir.

Q. Did you ever see him clean his ash-pan at 55?

(Testimony of Henry Lee.)

A. Not he—I have seen the fireman clean it there, but not Reed; that was the fireman's duty.

Q. Did you ever see him permit his pan to be cleaned on the bridge before?

A. Not as I remember.

Q. Now, at the time of this accident, how many rotaries did the company have?

A. They owned two rotaries.

Q. What did you call those two rotaries?

A. We called them the little rotary and the big rotary; the proper names were X1 and X2.

Q. X1 is the little rotary? [141—88]

A. The small rotary—and X2 is the large one.

Q. Now, then, it was X2 that you broke at Mile 52, was it not? A. Yes, sir.

Q. And had to bring it back to the shops?

A. Yes, sir.

Q. It was XI that you had with you on this trip, that was derailed? A. Yes, sir.

Q. You went to Chitina with those two engines and the caboose then, did you, after the accident?

A. Yes, sir.

Q. And what did you do after you got to Chitina?

A. Why, I laid over there one day and then I went to work, from there to Kennecott.

Q. You started working then, did you?

A. Yes, sir.

Q. To go to Kennecott?

A. I went to work between there and Kennecott.

Q. What were you doing?

(Testimony of Henry Lee.)

A. Running that local between Chitina and Kennecott.

Q. Who was running the local at the time you went to Chitina?

A. The north end local up there you mean?

Q. Yes.

A. Why, Fatty Reed was the engineer, Johnny Reed. Parkins was running the train, though.

Q. You didn't come back, down to the place where this accident happened?

A. No, sir; not until the road was opened and the bridge was rebuilt.

Q. That night of the accident, which way was the wind blowing? [142—89]

A. It was blowing from the left side of the train. If you can tell me just what direction that track is I can tell you the direction; it was blowing toward the glacier.

Q. Describe it—give us the direction by stating it as to the train coming down toward Cordova?

A. The way I remember it, it was blowing from the left side—it was coming down.

Q. That would be blowing across—

A. Toward the glacier there—there is a glacier there.

Q. Was there much of a wind?

A. No, I don't remember that there was a very heavy wind.

By the COURT.—Which way is the glacier going out?

(Testimony of Henry Lee.)

Mr. BORYER.—The glacier is on the left side going out.

Q. And you say that the fire was on the right-hand side of the track coming down toward Cordova?

A. Well, that is where it had burned; the ties and stringers were burned there; that is where the fire had been.

Q. Was that about the location where the rotary was standing while she was taking water?

A. Yes, about the location.

Q. You knew where the rotary was standing, did you, that night.

A. Somewhere near where it was standing.

Q. And you think that this fire was somewhere near where the rotary was standing?

A. Yes, sir.

Q. From what you saw of the position of the rotary and the fire and the condition of the stringers and ties would you say that that fire was caused from the fire of the rotary, in your best judgment.

A. No, I would not say so. I don't know whether it was caused from that or not. I couldn't say that caught from the cinders. [143—90]

Q. You couldn't say? A. No.

Q. You are certain it was not caused from your engine? A. I am not certain of it.

Q. You didn't clean your fire there?

A. Our fire was not cleaned there.

Mr. BORYER.—That is all.

(Testimony of Henry Lee.)

Redirect Examination.

(By Mr. COBB.)

Q. As a matter of fact, from your experience as an engineer on the railroad, it is not an uncommon thing for bridges to be set afire by the locomotive passing over them, when no fires are cleaned?

A. No, it is not an uncommon thing.

Q. What do they do to guard against that?

A. They generally have bridge sprinklers on their engine.

Q. Were there any bridge sprinklers on these?

A. No, sir.

Q. Do railroads that you have been accustomed to usually resort to any other method to see that the track is in order before a train is sent out?

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial, and does not tend to prove anything under the issues as raised in the pleadings.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. What is done to safeguard the track besides the sprinklers?

A. Why, they have track-walkers.

By the COURT.—I want it confined to the burning of the ties, the issues in your complaint. The negligence will have to [144—91] be confined to the issues you have raised in your complaint.

Mr. BORYER.—I move the answer be stricken.

By the COURT.—The motion is granted as not exactly responsive to the question and the jury is in-

(Testimony of Henry Lee.)

structed to disregard the statement.

Q. I will ask you if you know whether or not track-walkers are used for the purpose of safeguarding the track and if that is customary on railroads.

Mr. BORYER.—We object as incompetent, irrelevant and immaterial and does not tend to prove any facts in issue in this case.

By the COURT.—The objection will be sustained. It does not comply with what I have already ruled.

Mr. COBB.—Does the Court hold that under this pleading I cannot show that it was negligence in not having a track-walker?

By the COURT.—Unless it is in reference to or has to do with the burning of the ties and the bridge.

Plaintiff allowed an exception to the ruling of the Court.

Q. Coming back to the beginning of this trip—were you on the trip on which this train left here on the 28th of December, 1911?

Mr. BORYER.—We object to that as incompetent and irrelevant and tends to prove nothing under the issues and simply burdens the record.

By the COURT.—It has already been testified to. Unless it is something different than he has already testified to, the objection will be sustained. I let you go back to the 25th.

Mr. COBB.—This is preliminary and I think it is something new.

Q. Were you out on the trip of the 28th? [145—92]

Mr. BORYER.—We object to that for the reason

(Testimony of Henry Lee.)

that it is incompetent, irrelevant and immaterial and tends to prove nothing under the issues.

Objection overruled. Defendant allowed an exception.

A. Yes, I left Cordova on the 28th.

Q. How long were you out on that trip?

A. The time shows 24 hours between Cordova and Mile 39.

Q. Now, wasn't that the trip—I am not sure but I want to get at it—that the rotary was broken?

A. No, this was another rotary that was broken.

Q. Was there a rotary broken on that trip?

A. There was a rotary broken on this trip also.

Q. On the trip of the 28th? A. I think so; yes.

Q. Where did the little rotary come from that was sent up to relieve the one that was broken at Mile 39 or 52 on the trip of the 30th?

A. The little rotary came from Cordova.

Q. It was sent out from Cordova.

A. Yes, sir.

Q. When you reached Teikhell, how many hours had you been continuously on duty up to the time that you went off duty—how many continuous hours on that trip going up?

Mr. BORYER.—We object to that as incompetent and irrelevant and tends to prove nothing under the issues.

Objection overruled. Defendant allowed an exception.

A. 45 hours and 15 minutes my time shows.

Q. Now, Mr. Boryer asked you what you were do-

(Testimony of Henry Lee.)

ing there from 5:45, when the train got in there, up to the time you went off duty. I will ask you if you went off duty at the first [146—93] opportunity—as soon as you could. A. Yes, sir.

Q. State to the jury whether or not you went back on duty before you were ordered. A. No, sir.

Q. Mr. Boryer asked you on his cross-examination if you could see out ahead of that train coming back, as you approached this bridge, from your engine. I will ask you if there is any headlights to throw light ahead where the rotary is working? A. No, sir.

Q. No headlight at all? A. No.

Q. Can the engineer of the rotary see ahead at all—is the rotary built so he can see ahead?

Mr. BORYER.—We object to the question as incompetent, irrelevant and immaterial.

By the COURT.—I think it has been answered three or four times by this witness. I will sustain the objection for that reason.

Q. Can you recall whether you stated that or not—whether you could see ahead or not?

By the COURT.—You need not answer the question.

Q. What is the pilot for? A. To watch ahead.

Q. Do you have one on a locomotive?

A. No, sir.

Q. Only on a rotary? A. Yes, sir.

Mr. COBB.—That is all. [147—94]

(By Mr. BORYER.)

Q. I believe you testified that you were on duty, how many hours, the day before this accident—I

(Testimony of Henry Lee.)

mean before you started.

A. My slip shows 45 hours and 15 minutes.

Q. That you were on constant duty?

A. Yes, sir.

Q. Did you raise any objection to going, to taking that trip out that morning?

Mr. COBB.—We object to that as irrelevant and immaterial.

Objection sustained. Defendant allowed an exception.

Q. I will ask you if you ever objected to working the number of hours that you did work for the company.

Mr. COBB.—We object as irrelevant and immaterial.

Objection sustained. Defendant allowed an exception.

Q. I will ask you if on the particular trip that you took, leaving here on the 30th, if you did not work the number of hours that you did because you had met with an accident to your rotary?

A. Yes, that prolonged the trip, made it longer; yes, sir.

Q. That is the reason that you worked over 16 hours at a time?

A. That was one of the reasons, yes.

Q. What was the other reason, if any?

A. Heavy snows.

Q. Would it have been dangerous to the train and the passengers and the mail if you had stopped?

(Testimony of Henry Lee.)

A. It would have been dangerous in some places, in deep cuts.

Q. You would be liable to be snowed in?

A. Providing there was a high wind and the snow would drift in very quick, but there was lots of places where we could stop. [148—95]

Q. And if you happened to be drifted in, you would be liable to be held anywhere from three weeks to two months?

A. I don't know whether it would be that long or not.

Q. You have been held for three weeks, have you not? A. Not me.

Q. Along the road—the rotary has, has it not?

A. Yes, the rotary has. I was never on one of those trips.

Q. Don't you know that the rotary was held three weeks at about Mile 33 because they happened to separate their train for a short time there?

Mr. COBB.—We object to that. Objection overruled.

A. I have heard of the trip.

Mr. COBB.—We object to that answer and move it be stricken.

By the COURT.—It may stand, for the reason that it might have some weight on how they managed the trip at that particular time.

Mr. COBB.—Very well.

Q. After you left the terminal at Cordova on the afternoon of the 30th, your next terminal was Teikhell, was it not? A. Yes, sir.

(Testimony of Henry Lee.)

Q. I will ask you if you do not know that this road was not accepted and taken charge of by the Interstate Commerce Commission until September 1, 1912?

Mr. COBB.—We object to that—that is a question of law.

By the COURT.—He may answer if he knows.

A. I don't know.

Q. Did you ever receive a bulletin advising you when this road was placed in the hands of the Interstate Commerce Commission?

Mr. COBB.—We object as irrelevant and immaterial.

Objection sustained. Defendant allowed an exception. [149—96]

Q. I will ask you if you consider that the law, the service hour law, applied to you before September 1, 1912?

Mr. COBB.—We object as irrelevant and immaterial.

Objection *sustain*. Defendant allowed an exception.

Q. I will ask you if you have ever worked over the required time as provided by law, and the service hour law, since September 1, 1912.

Mr. COBB.—Same objection.

Objection sustained. Defendant allowed an exception.

Mr. BORYER.—That is all.

(By Mr. COBB.)

Q. Can you state to the jury how much you were

(Testimony of Henry Lee.)

delayed on this trip by the broken rotary?

A. No, I could not.

Q. Can you refer to your slips there and tell?

A. No, it does not show the delays. We are not required to show delays on our slips and we don't keep them.

Q. Now, how long did it take you—about what time was it—you left here at 11:45—before you got up to where the rotary was broken?

A. I don't remember that either. I don't remember what time it was.

Q. Can you give the jury some idea?

A. It was some time in the evening.

Q. Mr. Boryer said it was about 6 o'clock—?

A. I don't remember the time.

Q. About 6 o'clock that you got to this place where it was broken; where was it broken?

A. At Mile 52.

Q. Can you tell whether you were delayed twenty hours or not [150—97] by this broken rotary?

A. No, I don't think so.

(By Mr. BORYER.)

Q. Do you know?

A. No, I don't know for certain.

Q. Then you don't know? A. No, sir.

Q. While you were out on this trip you kept charge of your time?

By the COURT.—He has already answered that.

Question withdrawn.

Mr. BORYER.—That is all.

Witness excused. [151—98]

[**Testimony of Kenneth E. Holden, for Plaintiff.**]

KENNETH E. HOLDEN, a witness called and sworn in behalf of the plaintiff, testified as follows:

. Direct Examination.

(By Mr. COBB.)

Q. What is your name?

A. Kenneth E. Holden.

Q. Where do you live? A. Cordova.

Q. How long have you resided here?

A. Four years.

Q. What is your occupation?

A. Braking on the Copper River & Northwestern Railway.

Q. How long have you been in the employ of the Copper River & Northwestern Railway Co.?

A. Four years.

Q. You were in the employ of the company then during the months of December, 1911 and January, 1912? A. I was.

Q. You were in the employ of the company the whole month of December? A. Yes, sir.

Q. Did you make trips out over the road?

A. Yes, sir.

Q. About how long would it take you during that month to make the run to Teikhell?

Mr. BORYER.—We object as incompetent, irrelevant and immaterial and tends to prove nothing under the issues in this case.

Objection overruled. Defendant allowed an exception.

A. All the way from seven to twenty-four hours.

(Testimony of Kenneth E. Holden.)

Q. Were you on the trip, on the train that left here on the [152—99] 30th of December, 1911?

A. I was.

Q. What were you doing?

A. Pilot on the rotary.

Q. How long had you been pilot on the rotary?

A. That was the first trip, at that time.

Q. You are familiar with the method of construction of the house on the rotary,—the way it is put in?

A. Yes, sir.

Q. I wish you would explain to the jury—first, what do the crew of the rotary consist of?

A. Three men.

Q. Who are they?

A. Pilot, fireman and engineer.

Q. Where does the pilot stay?

A. At the head end of the rotary.

Q. I wish you to tell the jury what sort of a place he stays in and what his duties are, briefly.

A. Well, the rotary is, you might say, boxed in like a little house, with an engine inside. The pilot has a place up in the head-end and the engineer has a place in the middle of the rotary and the fireman is in the rear of the rotary. The engineer takes signals from the pilot.

Q. Why is it necessary for the pilot to signal the engineer? A. Because the engineer can't see.

Q. You mean he cannot see ahead at all there from where he is? A. No, sir.

Q. Is there any division between his compartment and that of the pilot? A. Yes, sir.

(Testimony of Kenneth E. Holden.)

Q. What does that division consist of? [153—100]

A. You mean how far it is from the pilot to the engineer?

A. No, what sort of a division is it?

A. I don't understand you.

Q. Is there a partition or what is it?

A. There is a little alleyway running from the pilot back to the engineer.

Q. A door in it? A. Yes, sir.

Q. And how is it between the place where the engineer stands and where the fireman is?

A. The same way.

Q. A door between the two? A. Yes, sir.

Q. Now, do you recall about what time you left here?

A. It was before noon on the 30th of December.

Q. Do you know where Bridge 75A is?

A. Yes, sir.

Q. The trestle there? A. Yes, sir.

Q. Do you recall about what time you got to that place? A. No, sir.

Q. You don't recall that? A. No, sir.

Q. What time did you get to Teikhell?

A. In the morning some time?

Q. The morning of what day? A. January first.

Q. Did you have an accident going up of any kind?

A. I don't think we did, no, sir.

Q. Did you go through with the same rotary?
[154—101] A. Yes, sir.

Q. Was there any accident to the rotary on the trip before that? A. Yes, sir.

(Testimony of Kenneth E. Holden.)

Q. What trip was that?

A. The trip just before we went out on this other trip.

Q. What accident was that?

A. The accident we had at Mile 52.

Q. Now, I want you to describe what that was?

A. The cylinder-head blew out.

Q. There was no such accident as that on this particular trip?

A. I don't think there was; no, sir.

Q. You took the same rotary clear through?

A. Yes, sir.

Q. Now, at the time you reached Teikhell had you been continuously on duty from the time you left Cordova? A. Yes, sir.

Q. You got there in the morning of the first. Do you know what time you went off duty?

A. No, sir.

Q. Could you give the jury any idea how long you were in there before you got through your work?

A. I had a sleep. I don't know how long I slept, but I was up about one o'clock. I guess I got up about one o'clock P. M.

Q. You were ordered on duty at that time?

A. I don't remember whether I was or not; no, sir.

Q. If you were not ordered on duty, what did you get up for?

A. I might have been ordered on duty at that time, but I don't remember.

Q. Now, coming back on the return trip, did you act as pilot? [155—102] A. Yes, sir.

(Testimony of Kenneth E. Holden.)

Q. About what time, as near as you can recall, was it, that you approached this bridge?

A. Some time after 7 o'clock.

Q. In the evening? A. In the evening.

Q. The first day of January? A. Yes, sir.

Q. Did anything happen there? A. Yes, sir.

Q. Tell the jury what it was happened.

A. Well, the rotary went through the bridge, was all I knew at the time.

Q. How did it go through the bridge?

A. I couldn't tell you at the time how it went through.

Q. Did it go straight down through?

A. No, sir, it went off on the side.

Q. Which side? A. On the right side.

Q. Just rolled off and turned over? A. Yes, sir.

Q. Where were you? A. In the pilot-house.

Q. Did you go down with it? A. Yes, sir.

Q. Then what happened to you—anything?

A. I scrambled around there trying to get out and couldn't get out, and finally I had assistance from George Scott, a brakeman on the rotary, and as I was trying to get out—he couldn't pull me out of there—I told him to go back to the [156—103] coach and get an ax, and while he was going back Mr. Flynn, who was the roadmaster at the time, held me up until Scott got the ax, and they chopped the window and pulled me out and after that I didn't know any more.

Q. You don't remember anything after that?

A. I don't remember anything after that; no, sir.

Q. As you approached this bridge were you watch-

(Testimony of Kenneth E. Holden.)

ing out the best you could? A. Yes, sir.

Q. Did you see anything to indicate danger?

A. No, sir.

Q. Could you see ahead? A. Yes, sir.

Q. Well? A. Not very, no, sir.

Q. Why?

A. Because it was snowing and the wind was blowing and it was a light snow and we were going fairly fast and it was throwing the snow. The snow was going to the left and the snow was flying from the wheel to the right of the hood so that you couldn't see ahead of it.

Q. It was a light snow?

A. It was a light snow.

Q. And the wheel was throwing it in all directions?

A. Yes, sir.

Q. Do you know how you were standing when the accident happened?

A. Right in front of the window.

Q. Do you know how many hours rest you had at Teikhell? A. No, sir.

Q. You have no idea? [157—104]

A. No, sir.

Q. But you do know you were called at one o'clock?

A. I know I got up at one o'clock. I don't know whether I was called or not,—I don't remember.

Mr. COBB.—That will be all.

Cross-examination.

(By Mr. BORYER.)

Q. Do you recall going out on the line on the 29th? Were you on the rotary that went out on the line on the 29th?

(Testimony of Kenneth E. Holden.)

A. I think I was on the local on the 29th.

Q. How far out did you go? A. Miles Glacier.

Q. Did you stop there? A. Yes, sir.

Q. What rotary did you have?

A. Well, I was not on the rotary.

Q. What rotary was preceding you?

A. I think it was the X2.

Q. Then you got out as far as the Glacier and you say something happened to you there,—to the rotary?

A. I think something happened to the rotary. I don't quite remember, but I was braking on the local and they put me off on the rotary and turned me back to Cordova—back on the rotary to Cordova.

Q. Do you recall what rotary that was?

A. No, sir.

Q. Do you recall whether it was the large rotary or the small rotary?

A. The large rotary, I think it was.

Q. The large rotary? A. I think so. [158—105]

Q. I don't want to get these rotaries confused. Can you say whether it was the large or small rotary?

A. No, I couldn't, really.

Q. You then don't know whether it was the large rotary or the small rotary? A. No.

Q. But whatever rotary it was, you came back on that rotary? A. Yes, sir.

Q. What time did you leave here that day?

A. On the local?

Q. Yes; this was on the 29th now?

A. Eight o'clock, I think, in the morning.

(Testimony of Kenneth E. Holden.)

Q. What time did you get to Miles Glacier?

A. Well, it was dark. I don't remember what time it was.

Q. That was in what month? A. December.

Q. What time does it usually get dark in December? A. I don't know.

Q. Doesn't it usually get dark about three or four o'clock in December? A. I think so; yes.

Q. And earlier than that? A. Sometimes.

Q. Now, then, what became of your local train when your rotary broke at Miles Glacier on the 29th?

A. I think it went on to Chitina.

Q. Without the rotary? A. No, sir.

Q. What rotary went on to Chitina with it?

A. I don't know what rotary. It was the rotary that came from Cordova. [159—106]

Q. At that time the company only had—how many rotaries? A. Two rotaries.

Q. Aren't you a little confused as to the rotaries and the train? If you will just think a moment you will find now that you are going to carry this rotary and train up to Chitina, and then the train that left here that the accident happened on left on the 30th?

A. Yes, sir.

Q. You understand that? A. Yes, sir.

Q. That the train the accident happened on left here on the 30th? A. Yes.

Q. Now, then, I will go back with you. You say that you broke the rotary that you started out with, with the local, on the 29th?

A. I think that was it. There was a difficulty in

(Testimony of Kenneth E. Holden.)

there some way or other with two trips. This rotary broke. I wasn't piloting on the rotary at all. I was just braking on the rotary.

Q. You came back with the rotary to the shop?

A. Yes, sir.

Q. And you arrived there about what time?

A. I don't remember what time that was.

Q. Was it late in the evening?

A. It was in the morning, I think, sometime.

Q. You pulled in over night with the rotary?

A. Yes, sir.

Q. Why were you bringing this rotary back?

A. Because it was broken.

Q. Why didn't you fix it there? [160—107]

A. I don't think it could be fixed there.

Q. Where are the shops of the Railroad Company located? A. In Cordova.

Q. Do they have any other shops along the line?

A. No, sir.

Q. Was it then, necessary, to bring the rotary back to Cordova? A. Yes, sir.

Q. To be repaired? A. Yes, sir.

Q. And you did bring it back to Cordova to be repaired? A. Yes, sir.

Q. Do you recall what was broken about the rotary? A. No, sir.

Q. You turned it over to the shops when you arrived here? A. Yes, sir.

Q. That was some time during the early morning of the 30th—is that correct?

A. I think it was—I am not positive of that.

(Testimony of Kenneth E. Holden.)

Q. You left on the 29th, and you came back on the 30th? A. On the 30th, yes, sir.

Q. That would be the morning of the 30th?

A. Yes, sir.

Q. Where was the other rotary then?

A. The little rotary? In Cordova.

Q. That is right?

A. That is right, yes.

Q. Now, let us start over. On the morning of the 29th you left here, then, on the local for Chitina, did you? A. Yes, sir.

Q. And you had with you what rotary?

A. I think the X2 was with us then. [161—108]

Q. That is the large rotary? A. Yes, sir.

Q. And when you got to Miles Glacier, what happened to the rotary?

A. The rotary, I think, was broken, got broken somehow or other.

Q. Was that on the 29th or on the 30th?

A. It must have been on the 29th.

Q. Wasn't it on the 30th?

A. I don't remember whether it was on the 30th or not.

Q. I will ask you this: Did you go out on the trip the day before, the trip that was made when this accident happened? A. Yes, sir.

Q. How far out did you go?

A. Miles Glacier was as far as I went.

Q. And then you came back? A. Yes, sir.

Q. And started out with the regular train next day? A. Yes, sir.

(Testimony of Kenneth E. Holden.)

Q. You brought back, then, on the 29th, the rotary that had gotten as far as Miles Glacier and was broken; is that correct? A. Yes, sir.

Q. The train stayed there, did it?

A. I don't think it did; no, sir.

Q. Where was the other rotary when you left town? A. Which one?

Q. The little rotary.

A. I think it was in Cordova.

Q. Did you pass it as you were coming in?

A. No, sir.

Q. Then, when you got back to town, it must have been in town? A. Yes, sir. [162—109]

Q. You arrived here that morning?

A. Some time in the morning; yes, sir.

Q. On the X2—that is the large rotary?

A. Yes, sir.

Q. What did you do after you arrived in town?

A. I went to the hotel.

Q. Then when were you called again?

A. Called for that morning, sometime.

Q. You were called that morning to go out with what? A. The X1.

Q. You went out with the X1, did you?

A. Yes, sir.

Q. Who was on X1 with you?

A. Reed and Albright.

Q. Did they start from town? A. Yes, sir.

Q. What did you have with you besides the rotary?

Q. Two engines and a caboose.

Q. How far did you go that day, on the 30th?

(Testimony of Kenneth E. Holden.)

A. I think we got to 55.

Q. What time did you get to 55? About what time?

A. I think in the morning some time, the forenoon.

Q. You left Cordova about what time on the 30th?

A. About noon.

Q. And about what time did you get to 49, Miles Glacier, that day?

A. I don't remember what time we got there.

Q. Approximately—have you any idea?

A. No, sir.

Q. What time did you get to Mile 55?

A. I think we got there in the morning sometime, probably between [163—110] 7 and 9 o'clock.

Q. Sometime between 7 and 9 o'clock the next morning? A. A. M., yes, sir.

Q. Did you make any stops between here and Mile 49? A. Not as I know of.

Q. Did you make any stops between Mile 49 and 55? A. Not as I know of.

Q. Did you break the rotary before you had gotten to 55 on this trip?

A. I don't think we did; no, sir.

Q. Were you in the courtroom when Mr. Lee was on the stand? A. Some of the time; yes, sir.

Q. Well, then, you got there some time in the morning—you got to 55 some time in the morning of the 31st? A. Yes, sir.

Q. About how many hours were you going from Cordova to Mile 55?

A. From noon on the 30th until 8 or 9 o'clock on the

(Testimony of Kenneth E. Holden.)

31st, I think—the morning of the 31st.

Q. Why were you so long making that trip?

A. We had lots of snow—it takes time to throw snow out.

Q. Did you have the local behind you?

A. I think it was; yes, sir.

Q. Do you know where you were about 6 o'clock.

A. On the 31st?

Q. On the 30th? A. No, sir.

Q. What were the weather conditions?

A. They were not so bad; the wind wasn't blowing.

Q. Why didn't you stop? A. Where?

Q. That night—you left here about—the forenoon of the 30th? [164—111] A. Yes, sir.

Q. Then, when night came on, why didn't you stop?

A. I don't know. They kept on going, and I wasn't in charge of the train. I had to stay up there in my place as long as they went.

Q. You just kept going? A. Yes, sir.

Q. Your next terminal was Teikhell?

A. Yes, sir.

Q. That is at Mile— A. 101.

Q. You were making for Teikhell, were you?

A. Yes, sir.

Q. That is as far as you take the rotary, is it not?

A. Sometimes.

Q. You very seldom take the rotary above Teikhell? A. No, sir.

Q. And then you left 55—where did you eat breakfast?

(Testimony of Kenneth E. Holden.)

A. I don't remember where we ate breakfast.

Q. How long did you stop at 55?

A. I don't remember that.

Q. Did you stop there? A. We did.

Q. Did you take water there? A. I think so.

Q. Did you do any other work there?

A. Not as I know of.

Q. You were on the rotary at the time?

A. Yes, sir.

Q. Did the other engines take water there?

A. I don't know. [165—112]

Q. Then you left 55 and started for Teikhell?

A. Yes, sir.

Q. Do you recall about what time you got to Bridge 75A?

A. Somewhere between 7 and 11 o'clock on the night of the 31st.

Q. Did you pass over that bridge? A. Yes, sir.

Q. Did you return to the bridge?

A. We backed up—I don't know how far we came back.

Q. Did you stop on the bridge?

A. I don't know.

Q. When you started back, where was your first stop?

A. I don't know where they stopped,—what mile we stopped on.

Q. Did you stop? A. Yes, sir.

Q. Did you take any water there?

A. I don't know.

Q. Did you make more than one stop?

(Testimony of Kenneth E. Holden.)

A. I don't remember.

Q. Do you remember if you backed—made one stop and then backed down and got some coal or something? A. No, sir.

Q. You mean you did not or don't recall?

A. I don't recall it.

Q. You don't recall making two stops?

A. No, sir.

Q. If two stops were made, do you recall doing any work at either one of these stops?

A. No, sir; I do not.

Q. What time did you reach the first terminal after leaving Cordova, that is, the Mile 101, or Teikhell?
[166—113] A. What time did we reach there?

Q. Yes.

A. Sometime in the early morning—I don't know what time it was.

Q. After you reached there, what did you do?

A. I went to bed.

Q. And where did you go to bed?

A. In the caboose.

Q. Where did Mr. Reed go to bed?

A. In the same bunk I had in the caboose.

Q. Did you go together? A. Yes, sir.

Q. That is the Engineer Reed? A. Yes, sir.

Q. You say you remained in bed until about one o'clock? A. Somewhere along there; yes, sir.

Q. And did you get up first, or did he get up first?

A. I don't remember.

Q. Do you recall if he was still in bed when you

(Testimony of Kenneth E. Holden.)

left your bed? A. No, I do not.

Q. What did you do after you got up?

A. Reed and I had some work to do on the rotary—went over and worked about two or three hours on the rotary.

Q. What work did you do on the rotary?

A. Tightening up nuts and bolts and one thing and another.

Q. And then what time did you start south, for Cordova? A. About 4 o'clock.

Q. And the rotary came on down to Bridge 75A?

A. Yes, sir.

Q. And it was at this point that the rotary was derailed? A. Yes, sir. [167—114]

Q. Do you know anything of the conditions that existed there at the time? A. No, sir.

Q. You were caught in the rotary yourself?

A. Yes, sir.

Q. Where were you taken? A. Chitina.

Q. Did you see the bridge after you were taken out? A. No, sir.

Q. Who composed the crew of this particular train that was pushing the rotary, if you remember?

A. Mr. Lee—

Q. Who is Mr. Lee?

A. The engineer on the first pusher.

Q. He had charge of the first pusher, did he?

A. Yes, sir.

Q. Who had charge of the second pusher?

A. Mr. Dan Barrett.

(Testimony of Kenneth E. Holden.)

Q. Where is he? A. I don't know.

Q. And Mr. Reed had charge of the rotary?

A. Yes, sir.

Q. Do you know what caused the rotary to become derailed? A. I did not at the time, no, sir.

Q. Did you examine it in order to find out?

A. No, sir.

Q. Do you know now? A. Yes, sir.

Q. I will ask you what did cause it.

A. The bridge burned is all I know about it.

Q. And it fell through because of the burned bridge? [168—115] A. Yes, sir.

Q. And what rotary was that? A. X1.

Q. The small rotary? A. Yes, sir.

Mr. BORYER.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. It is the same rotary you left Cordova with?

A. Yes, sir.

Q. Is there any reason why you cannot remember definitely all that transpired going up about stopping, etc.?

A. It is not a pilot's duty to know what is going on behind him—when they are backing up and if he has any chance to rest he is going to rest when they are backing up.

Q. Were you in need of rest?

A. No, not necessarily.

Q. How long had you been on duty at that time?

A. From 12 o'clock on the 30th until whatever time

(Testimony of Kenneth E. Holden.)

we stopped there.

Q. The evening of the 31st? A. The 31st.

Q. Did you take some rest while you were there—what you could get?

A. I snatched a little bit there; yes, sir.

Q. When you left here did you know pretty well what sort of a trip you were up against?

A. Yes, sir.

Q. That was generally understood,—there was a hard trip ahead? A. Yes, sir.

Q. And there had been a number of hard trips before that? [168½—116] A. Yes, sir.

(By Mr. BORYER.)

Q. How did you know what kind of a trip you had ahead of you?

A. Because it was the time of the year for hard trips.

Q. Some trips you go through in a short time, do you not? A. Yes, sir.

Q. In how many hours?

A. From Cordova to Teikhell?

Q. Yes. A. Six or seven hours.

Q. In the winter-time? A. Sometimes; yes.

Q. And sometimes it takes longer?

A. Yes, sir.

(By Mr. COBB.)

Q. There is a telegraph line up the road, is there not? A. Yes, sir.

Q. And you can always tell pretty well what you are up against before you leave? A. Yes, sir.

(Testimony of Kenneth E. Holden.)

(By the COURT.)

Q. Explain to the jury what lights, if any, you have on your rotaries and what motion the rotary takes in shoving the snow out or clearing the track and whether it came up above the top of the rotary.

A. We have no lights on the rotary at all, and the snow generally goes to the side of the rotary, from whatever direction the wheels are working—it goes clear out to the side, sometimes ten or twenty or thirty feet.

Q. In going out, does it go out above the top of the rotary? [169—117] A. No, on one side.

Q. You have a clear view, then, on one side, on this occasion, on the right-hand side? A. Yes, sir.

(By Mr. BORYER.)

Q. Why don't you have lights on the rotary? You couldn't use them, could you? A. No, sir.

Q. (By Juror PEDERSEN.) Was the rotary in operation at the time the accident occurred?

A. It was.

Witness excused. [170—118]

[Testimony of Charles Kitsman, for Plaintiff.]

CHARLES KITSMAN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Charles Kitsman.

Q. Where do you live? A. Cordova.

Q. How long have you lived here?

A. Since September, 1909.

(Testimony of Charles Kitsman.)

Q. What is your occupation? A. Fireman.

Q. Where are you employed?

A. Copper River & Northwestern Railroad.

Q. How long have you been employed by them?

A. Since September—I think the 29th—1909.

Q. You were in the employ of the Copper River & Northwestern Railway Co., then, in the month of December, 1911, and January, 1912? A. Yes, sir.

Q. What were you doing?

A. I was firing at the time.

Q. Were you on the train that left Cordova for Teikhell about the 30th of December, 1911?

A. Yes, sir.

Mr. BORYER.—I suggest the witness be required to state what he means by “about”—there were two trains, one left on the 29th and one on the 30th.

Q. What time did you leave here on the 30th?

A. I don't just exactly remember. It was some time in the forenoon, I think. [171—119]

Q. On what engine were you firing?

A. Engine 21.

Q. What was the engine doing on that train?

A. Second pusher.

Q. Who was your engineer? A. Mr. Barrett.

Q. The gentleman that has been testified to has gone out? A. Well, he is not here at present.

Q. Did anything happen to the rotary on your way, on that trip?

A. Not that I know of, no, sir.

Q. If it had broken down you would have known it?

(Testimony of Charles Kitsman.)

A. Well, I suppose so if I went around there; yes.

Q. You took the same rotary through, did you not?

A. Yes, sir.

Q. What time did you reach the trestle at Bridge
75A? A. On our way up?

Q. Yes.

A. Well, it was some time in the evening.

Q. Evening of what day? A. The 31st.

Q. You couldn't state the hour? A. No, sir.

Q. Do you think it was prior to 9 o'clock?

A. Somewhere between then and midnight.

Q. When you reached there, did the train stop?

A. You mean at the trestle?

Q. Yes. A. No, we went over the trestle.

Q. How far did you go?

A. I couldn't tell you how far it was.

Q. About? [172—120]

A. Probably half or three-quarters of a mile,—
probably more than that.

Q. Then what did you do?

A. I heard that they ran short of water and they
were deciding on shoveling the snow some way or
other and some were talking about going back to
this bridge and siphoning water—they would make
more headway that way.

Q. Did they go back to the bridge?

A. Yes, sir.

Q. Backed back? A. Yes, sir.

Q. When they got there what was done?

A. Well, I walked up there to see if they would
strike water because it was a glacier stream and I

(Testimony of Charles Kitsman.)

thought it would be frozen over that time of the night, and here were some section-men that chopped a hole in the ice and got water, and everybody was around there, quite a bunch around there, and I don't know if they were siphoning water there but I am pretty sure they did.

Q. Where were those section-men from?

A. I should judge they were from 78.

Q. Is there a section-house there? A. Yes, sir.

Q. How far from this bridge?

A. The bridge is on 75 or Mile 76 and the section-house is 78; there is a water-tank there.

Q. A couple of miles? A. Yes, sir.

Q. What became of those section-men?

A. I don't know—I couldn't tell you. [173—121]

Q. Did you leave them at the bridge?

A. I don't know.

Q. Do you know what they came back there for?

A. I suppose to help coal up.

Mr. BORYER.—We move to strike the answer.

By the COURT.—It may stand.

Q. How long were you at this bridge?

A. I should judge between an hour and two hours, something like that.

Q. The other engines got water there?

A. Not that I know of; no, sir.

Q. After you got through getting the water, what did you do?

A. I don't know whether they coaled up afterwards or before but after we got all through, we went to 78.

(Testimony of Charles Kitsman.)

Q. You don't know whether they coaled up before they got water or after?

A. No, I don't remember.

Q. They did coal up there? A. Yes, sir.

Q. Tell the jury how that coaling up was done—is there a coal chute there? A. No, sir.

Q. Tell them how it was done.

A. They had to put the coal off on the snow bank, off a car on the local, and then back up with the rotary and put it on the rotary.

Q. These two hog engines were coupled to the rotary at all times? A. Yes, sir.

Q. And when the rotary was on the bridge they were standing there too? [174—122]

A. Yes, sir.

Q. They were both on the bridge?

A. I couldn't tell you that,—I don't know whether the bridge would hold two locomotives.

Q. You don't know how long it was, but they were coupled right up to it?

A. They were coupled up; yes, sir.

Q. Do you know anything about any fires being cleaned there from any of the engines?

A. I couldn't say whether there was any fire dumped there or not—I couldn't say.

Q. How long have you been a fireman?

A. I have followed it off and on since 1907.

Q. Is there any danger from a locomotive standing or running over a road from fire getting on the track from the engine, whether there are ashes cleaned from it or not? A. There may be.

(Testimony of Charles Kitsman.)

Q. Explain to the jury how that happens?

A. Well, I will tell you; it depends what kind of a pan is on your locomotive.

Q. How?

A. If you have got a flat pan and both dampers are open and you are speeding along, if it should happen that any fire should drop through, the wind would naturally blow it right out of the pan.

Q. What sort of pans do you have on your locomotive, the engine you were on?

A. It is a hoe-pan—was at that time.

Q. A hoe-pan? A. Yes, sir.

Q. Which way did it hoe? [175—123]

A. It hoed out in the rear or to the front.

Q. It didn't hoe to one side? A. No, sir.

Q. Now, is there any danger from fire from the pans becoming too full of ashes and fire falling out from it? A. I couldn't tell you about that.

Q. This was not a pan you could dump from the train? A. No, sir.

Q. You had to get down under it?

A. From the deck you mean? Dump from the deck?

Q. Yes. A. No.

Q. You had to get down under the train?

A. Yes, you had to get down to hoe it out.

Q. These four engines, then, passed over that bridge three times. They passed it going up, they passed back across it to get coal—backed on to it for water and then back to get coal and passed on over it again on the way up to Teikhell?

(Testimony of Charles Kitsman.)

A. To take coal they had to back over it, yes.

Q. So they passed over this bridge, these four engines, on that occasion, three different times?

A. The three locomotives and the rotary; yes, sir.

Q. What time did you get to Teikhell?

A. We got there the morning of the first some time.

Q. Do you recall the time?

A. No, sir, I could not.

Q. When you got in there, did you have any work to do—after you reached there?

A. No, not on my locomotive, no, because we had a watchman.

Q. How is that?

A. No, I didn't have any work. [176—124]

Q. You went off duty as soon as you got in?

A. Yes, sir.

Q. What time were you called?

A. We were called some time about midday, about noon some time, but we didn't leave there at the time we were called.

Q. Do you know why?

A. As far as I know, they had some work to do on the rotary.

Q. Who was doing that work? A. Reed.

Q. They were to get out at noon but couldn't do it because of this work on the rotary that Reed was doing?

A. As far as I understand; yes.

Q. You saw him at work there, did you?

A. I don't know, I never was up there.

Q. You don't know? A. No.

Q. Now, when you left there—you left at 4 o'clock?

(Testimony of Charles Kitsman.)

A. Just about, yes, sir.

Q. Do you know what time you got to this bridge on your return?

A. It was about—it was between 7 and 8 some time.

Q. Between 7 and 8? A. Yes, sir.

Q. When you got to the bridge, did anything happen?

A. Why, I felt a sudden stop; yes, sir.

Q. Then what did you do?

A. Mr. Barrett was looking out of the window and he turned around and said something to me about the rotary being in the ditch, and that is all he said, and jumped out, and I jumped across and looked out of the window and I see the rotary in the ditch, so I jumped out of the window and went [177—125] over there.

Q. On which side did the rotary turn?

A. It turned to the right.

Q. As it was coming this way? A. Yes, sir.

Q. When you got around to the front what did you see?

A. Well, when I got to the rotary I saw Wilson there with a lantern and I saw Mr. Albright, the fireman—he was in the coal buried up; so I got in there and tried digging the coal away from him, helped to dig him out. So we got him out and helped carry him back to the coach and stayed there a while, and by that time they were deciding to go back to Chitina, so I left for the engine I was on—we were low of water and thought it would be a good idea to get over there.

Q. How is that?

(Testimony of Charles Kitsman.)

A. I was in the coach—I helped carry Albright into the coach and stayed in there a few moments taking off his shoes or shoe packs, what he had on, and by that time they had decided to go back to Chitina, so I thought I would have to go on the engine, so I went over on the engine I was on.

Q. Did you help get Holden out?

A. No, I did not.

Q. Did you see them getting him out?

A. No, sir.

Q. You were busy all the time getting Albright out and taking him back? A. Yes, sir.

Q. Do you know what became of Reed, did you know?

A. No, I did not. What became of him? [178—126]

Q. Yes, what became of him?

A. He was underneath the boiler.

Q. You saw the men trying to get him out?

A. I saw a number of men around there and heard them chopping.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Are you certain that you went through with the same rotary that you started with from here on the 30th?

A. Yes, sir—well, I am pretty certain; yes.

Q. Have you any means whereby you could refresh your memory to determine which rotary you went out on and whether that rotary continued all the way to Teikhell?

(Testimony of Charles Kitsman.)

A. Well, yes, I think it was the X1 the time we left.

Q. You think it was X1—that was the small rotary? A. The small rotary; yes, sir.

By the COURT.—I think we will adjourn at this time.

Mr. BORYER.—I would like to say to the witness, I would like to have you refer to any memoranda you can so you can determine definitely as to what rotary you left on and whether that rotary went clear on to Teikhell, by the morning.

The WITNESS.—Yes, sir.

Whereupon court adjourned until to-morrow (Friday) morning, May 2, 1913, at 10 o'clock.

Friday, May 2, 1913.

MORNING SESSION.

Continuation of the cross-examination of CHARLES KITSMAN.

(By Mr. BORYER.)

Q. You left here, on what day was it?

A. It was the forenoon, on the 30th.

Q. What rotary *preced* you? [179—127]

A. What do you mean? What we went on through with?

Q. No, which rotary did you start out of Cordova with?

A. I think we started on X2, to the best of my knowledge—we went to Mile 52 and broke down.

Q. That is the large rotary?

A. That is the large rotary.

Q. Then when you got to 52 you had a breakdown there with rotary X2? A. Yes, sir.

(Testimony of Charles Kitsman.)

Q. Do you recall what was broken?

A. I don't know. I didn't go up—just what I heard say that they broke a quarter-shaft and blew out a cylinder-head.

Q. Then where did you go?

A. Back down to 39, I think it was, where we could get water.

Q. And what did you do there—what became of rotary X2?

A. I think they took her down on one side, put her so she would run on one side.

By the COURT.—Explain to the jury what you mean by that.

A. That is in order that she will run on one side. If one side is broke, he would have to close up her port-hole so she would only run steam on one side, one cylinder.

Q. Then after you had done this work, what did you do with the rotary—before that, how long were you there, about how long?

A. I couldn't tell you how long we were there.

Q. Several hours, were you?

A. Yes, we must have been there a few hours; yes.

Q. Do you know who was doing this work on the rotary?

A. I didn't go up there, but I suppose it was Mr. Reed and the fireman,—probably somebody helping him.

Q. I am trying to get what you know. [180—128]

A. I didn't go up there that I remember of.

Q. You don't know, then, who did the work?

(Testimony of Charles Kitsman.)

A. No, sir.

Q. Where did you stay?

A. I was on the engine of the second pusher.

Q. You stayed on the engine? A. Yes, sir.

Q. Then where was your next move?

A. I think we went to Miles Glacier.

Q. Do you know what for?

A. To change rotaries there.

Q. Then you went back up toward Chitina, to Miles Glacier, did you? A. Yes.

Q. What mile is that? A. Miles Glacier?

Q. Yes. A. 49.

Q. And you had gone back to what mile?

A. 39.

Q. That is where you got your water for the rotary?

A. I couldn't say whether they done all of it there or done some of it at the glacier.

Q. I am trying to get the miles, so the jury can understand the moves you made, up or down. There is no place to turn the rotary at 39? A. No, sir.

Q. Is there a place to turn the rotary at the Miles Glacier? A. Yes, sir.

Q. Then you proceeded from Mile 39 out to the glacier, and when you got to the glacier, about what time was it? [181—129]

A. I couldn't tell you what time it was.

Q. Was it dark?

A. I think it was. It was some time in the evening—I am not certain.

Q. Did the large rotary turn at Miles Glacier?

A. Yes, sir.

(Testimony of Charles Kitsman.)

Q. And where did it go?

A. I suppose it went back to Cordova.

Q. Had the little rotary, or X1, arrived at the glacier before the rotary that you had broken departed for Cordova?

A. Yes, I think it did—yes, I know it did.

Q. About how much time did you spend at the glacier?

A. I couldn't tell you. Probably a half hour or an hour, something like that.

Q. And then the small rotary, the rotary X1 as it is known, proceeded ahead of the local, did it?

A. Yes, sir.

Q. Towards Chitina? A. Yes.

Q. Now, then, when did you make your next stop?

A. I couldn't tell you that—we are liable to stop almost any place.

Q. Do you recall making any stop—did you go through the canyon?

A. Yes, we stopped at the water tank at 55, I know.

Q. Did you have any work at the canyon with the rotary? A. Yes, sir, there was work.

Q. About how long were you going through that canyon?

A. I couldn't tell you how long it was.

Q. Have you any idea? A. No, sir. [182—130]

Q. Then you say you left Miles Glacier some time during the night? A. I think it was; yes.

Q. Did you work through the canyon during the night? A. I think we did.

(Testimony of Charles Kitsman.)

Q. And you reached 55? A. Yes, sir.

Q. And there you took water? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. How long were you taking water at 55?

A. I don't know how long we were there—it doesn't take long to take water.

Q. About how long does it take?

A. I should judge, to water up the three locomotives it would take about thirty minutes.

Q. Did you water all three locomotives?

A. I know I watered the one I was on.

Q. Do you know if the rotary took water there?

A. I couldn't tell you but I suppose it did.

Q. Then you started from 55—you don't know about what time it was you left 55?

A. No, I couldn't tell you.

Q. How was your work further on up to Bridge 75A in regard to snow conditions?

A. We were fighting snow all the way up.

Q. Any wind?

A. Oh, there might have been a little breeze; yes.

Q. Do you recall whether there was any breeze or not? [183—131]

A. I couldn't tell you whether it was stormy or anything like that. It generally does blow through there.

Q. Do you recall crossing Bridge 75A?

A. Yes, sir.

Q. On your way up? A. Yes, sir.

Q. Did you pass over that bridge on your way up?

A. Yes, sir.

(Testimony of Charles Kitsman.)

Q. Did you stop after you had gotten across the bridge?

A. They stopped in a snowdrift there after they had gotten across some distance.

Q. About how far would you say?

A. I couldn't tell you how far it is. Probably half or three-quarters of a mile—probably more than that.

Q. Then what did you do after that, after stopping there?

A. Well, the rotary ran out of water there and they decided, were talking about going back and siphoning water at this bridge.

Q. At what bridge? A. 75A.

Q. What did you do?

A. Backed up then to the bridge and siphoned water.

Q. The local backed up?

A. I suppose it did—I didn't see the local there.

Q. She was following close behind you?

A. Yes, sir.

Q. She would have to back up in order to get out of the way? A. Yes, sir.

Q. A single track, is it? A. Yes, sir.

Q. When you got down to the bridge what was the position of [184—132] your engine with reference to the rotary?

A. She was the second engine, the second pusher.

Q. Who was your engineer? A. Mr. Barrett.

Q. When you stopped to siphon water, where was your engine standing?

(Testimony of Charles Kitsman.)

A. Well, it was on the south end of the bridge.

Q. The south end of the bridge would be toward Cordova? A. Toward Cordova; yes, sir.

Q. How far off the bridge was it?

A. I couldn't tell you. There might have been some part of it on the bridge and might not. It depends where the rotary stopped.

Q. Do you know if it was or was not?

A. I couldn't tell you.

Q. Were you off of your engine during the time that you staid there? A. Yes, sir.

Q. Do you recall how you got off your engine?

A. I got off through the gangway.

Q. Do you recall if you stepped on the bridge or stepped on the ground?

A. I got off in the snow.

Q. Then you were not on the bridge, were you?

A. I don't think I was; no.

Q. To the best of your judgment, would you say that you were or were not on the bridge?

A. I would say I was not.

Q. What was being done, if anything, by the other engines which you saw when you got off of your engine? [185—133]

A. There wasn't anything done, only they were siphoning water. I was up there where they were siphoning the water. I was up in the rotary.

Q. You were up in the rotary? A. Yes, sir.

Q. Did you clean your pan at this place?

A. No, sir.

Q. Are you certain of that?

(Testimony of Charles Kitsman.)

A. Yes, sir; I am certain.

Q. Did you clean your fires there?

A. Not that I know of; no, sir.

Q. And you are certain you did not dump your pan there? A. No.

Q. You would know if you did? A. Yes, sir.

Q. Where was the local at that time?

A. It was on the south end of us, toward Cordova.

Q. Then if you were not on the bridge with your engine the local could not have been on the bridge?

A. No, sir.

Q. Where was your engineer while you were stopped there?

A. I couldn't tell you where he was. He was on the engine.

Q. And you are certain that he gave you no instructions to clean your pan there? A. Yes, sir.

Q. And you say that you got off of your engine and walked up past under pusher engine?

A. Yes, sir.

Q. Which was attached to the rotary—and got on to the rotary? A. Yes, sir. [186—134]

Q. Who did you see on the rotary?

A. I saw Mr. Albright on there.

Q. Who is Mr. Albright?

A. The fireman of the rotary.

Q. Were you talking with him?

A. I think I did; yes.

Q. What was he doing?

A. Well, he was working back in the boiler-head there.

(Testimony of Charles Kitsman.)

Q. What kind of work was he doing?

A. I think he was putting in a fire or something like that.

Q. Cleaning his pan? A. No, sir.

Q. He was working with his fire?

A. Yes, he was putting in a fire—doing something back there. I don't just remember what.

Q. Did you see Mr. Reed?

A. I have seen him at a distance; yes.

Q. Do you recall if you did see him?

A. I wouldn't say for sure whether I did or not. There was quite a number of them standing down there in the snow.

Q. Did you see Mr. Reed on the engine, on the rotary? A. There at the bridge?

Q. Yes.

A. No, I don't think I did. It was dark, you know.

Q. Albright was on the rotary when you saw him?

A. Yes.

Q. Working with his fires? A. Yes, sir.

Q. Did you see Mr. Holden?

A. I don't think I did. I don't remember as I did.

[187—135]

Q. Do you remember if you saw Mr. Reed?

A. I saw Mr. Reed before that, yes.

Q. I mean on the engine, on the rotary, at this time? A. I don't remember as I did.

Q. Did you see Mr. Reed at all while you were stopped there?

A. I might have seen him down on the ground there

(Testimony of Charles Kitsman.)

where they were chopping a hole in the ice; there was quite a number of them down there.

Q. You mean by saying that you might have seen him that you did see him or don't know whether you did see him or not?

A. I might have saw him; yes.

Q. Do you know whether you did see him?

A. I might see him at a distance in the night; yes.

Q. You saw him, did you?

A. He might have been there and might not have been there.

By the COURT.—I think you have gone over that enough.

Q. Now, then, how long did you remain there?

A. I should judge we were there probably one or two hours.

Q. You went back, then, to your engine, did you?

A. Yes, sir.

Q. And what did you do after you went back to the engine?

A. I suppose I tended to the fire, that is, kept up steam and kept water in the boiler and watched out.

Q. Did you do that? A. Yes, I did.

Q. Then, where was your next move?

A. I think we backed up and took coal.

Q. At the place where coal had been unloaded?

A. Yes, sir.

Q. Then you loaded your coal and started for where? A. 78. [188—136]

Q. About what time did you arrive at 78?

A. It was some time about, I should judge, be-

(Testimony of Charles Kitsman.)

tween ten and twelve, something like that. I couldn't exactly say what time it was.

Q. That night? A. Yes, sir, that night.

Q. Did you take water at 78?

A. Yes, sir.

Q. And how long did you stay at 78?

A. I think we had lunch there. It would probably take an hour or an hour and a half—something like that.

Q. Then what time did you arrive at Teikhell?

A. We got into Teikhell the next morning. I should judge it was daylight when we got there. I don't know. It was about 7 o'clock—something like that.

Q. What time did you quit work there?

A. I quit as soon as we got there.

Q. Seven o'clock or eight o'clock?

A. Yes; somewhere about that.

Q. Then after you quit work, where did you go?

A. I went to bed.

Q. Where did you go to bed?

A. In the caboose.

Q. Who was in the caboose when you went in there?

A. I don't know who all was in there—I think Scott was in there.

Q. Who is Scott?

A. George Scott, the brakeman.

Q. The brakeman of what? [189—137]

A. The rotary.

Q. Who else?

(Testimony of Charles Kitsman.)

A. I think Mr. Barrett. I think I and Barrett went back together.

Q. And who else?

A. I couldn't exactly say who all was in there.

Q. Was Reed in there?

A. No, not when I went back. No, I don't think he was.

Q. Was Albright in there?

A. No, I don't think he was.

Q. Holden? A. I didn't see him.

Q. Do you recall anyone else who was in there at that time?

A. Not that I know of, no; they might have come in just a little later on.

Q. How long after you had gone to the caboose to go to bed was it before Holden came in?

A. I couldn't tell you.

Q. Do you know if he came in?

A. I couldn't tell you. I went to sleep after I got in there.

Q. Do you know if Reed came in?

A. I couldn't tell you.

Q. Do you know if Albright came in?

A. I couldn't tell you. I think I was asleep before they got back in there.

Q. What time did you get up?

A. Twelve or one o'clock,—something like that.

Q. After you had gotten up, did you stay in the caboose any of the time?

A. No, I think we just got up in time to get up and get something [190—138] to eat at the section-

(Testimony of Charles Kitsman.)

house and when we came back from there I think I went on the engine.

Q. Who was in the caboose when you got up?

A. I couldn't tell you who was all in there.

Q. Do you know if Holden was in there?

A. The time I got up?

Q. Yes.

A. I wouldn't say for sure, but I think they were all in there—I don't think anybody was up then.

Q. You think Holden was in there?

A. I think he was.

Q. And you think Albright was in there?

A. I think he was.

Q. And you think Reed was in there?

A. I think he was.

Q. You think all of the crew was in there?

A. I think they called us all at the same time.

Q. After you had your dinner what did you do?

A. I went on the engine.

Q. What time did you leave there?

A. Some time about 4 o'clock.

Q. How long did you stay on the engine?

A. When?

Q. When you went on the engine after eating your dinner.

A. I might have been off and on around there from 12 or 1 o'clock to 4, probably didn't stay right on the engine.

Q. Who was taking care of your fires from that time until the time you got ready to leave?

A. From one o'clock?

(Testimony of Charles Kitsman.)

Q. Yes. [191—139]

A. I might have taken care of them myself or the watchman may have been around there and he might have taken care of them, or probably Mr. Barrett took care of them.

Q. Don't you know that the watchman did take care of your fires?

A. He was supposed to take care of the fires, yes, while I was asleep.

Q. And don't you know he took care of your fires up to about the time you left?

A. Probably he did while I was not there.

Q. While you were at Bridge 75A did you see anyone clean their pan at that point, on that bridge?

A. I couldn't say that I did, no, sir.

Q. Did you see Mr. Albright working on his pan?

A. I don't know that I did see him working. I was talking to him there—I don't know that I see him dump any ashes there or anything.

Q. This was in the winter-time, was it not?

A. Yes, sir.

Q. The ground was all covered with snow?

A. Yes, sir.

Q. Cold weather? A. Yes.

Q. Was it you that said something about sprinklers up and down the Copper River & Northwestern Railroad? A. No, sir.

Mr. BORYER.—That is all.

(By Mr. COBB.)

Q. Does your engineer always tell you when to dump your ashes? A. No, sir. [192—140]

(Testimony of Charles Kitsman.)

Q. Or where to dump them? A. No, sir.

Q. That is the fireman's business?

A. Well, he is supposed to know it; yes.

Q. When you got up, out of the caboose, at Teikhell, you were called?

A. I think somebody woke us up; yes.

Q. Called to go on duty?

A. I suppose so; yes.

Q. And did go on duty—that was somewhere between 12 and 1?

A. Something like that; I couldn't exactly say.

(By Mr. BORYER.)

Q. You say the engineer doesn't tell you always when to dump your ashes?

A. That depends—if he has a green fireman, he naturally would tell him; yes.

Q. Why would he tell him?

A. Instruct him what he is supposed to do.

Q. It is the engineer's duty to instruct him?

A. Yes, sir.

Q. The engineer has charge of the engine?

A. Yes, sir.

Q. Working on the engine? A. Yes, sir.

Q. And is responsible for the engine?

A. The engine is in his charge.

Q. He has supervision over you and the fires?

A. I suppose he has; yes.

Q. You know it is against the rules to dump your fire on the bridge, don't you? [193—141]

A. Yes, sir.

Q. You know it is against the rules to even dump

(Testimony of Charles Kitsman.)

the fires on the ties, do you not, without putting the fire out and throwing it off the track?

A. There are lots of places that they tell you to dump cinders—there are certain places where they tell you to dump cinders.

Q. They have certain specified places?

A. Some roads, yes.

Q. And after you dump them, what do you do?

A. There are lots of times they used to dump them on the run, dump them in the city limits.

Q. You put your fires out then?

A. When they dump them on the run?

Q. No, not on the run—when you dump your fires, don't you usually put your fire out?

A. Well, if there is any danger; yes.

Q. There is always danger where you dump your fires, isn't there? A. A live fire, yes.

Q. Then how do you put them out?

A. Generally shovel them off the track or turn the hose on it, wet it.

(By Mr. COBB.)

Q. Did you ever see such rules as you have spoken of here? A. As to dumping cinders?

Q. Yes.

A. The Great Northern has got signs out where it says, dump cinders here.

Q. Any signs of that kind on the Copper River & Northwestern? A. I never seen any. [194—142]

Q. Did you ever see any rules issued by the Copper River & Northwestern Railroad Co. regarding these matters, printed or written rules?

(Testimony of Charles Kitsman.)

A. That is certain places to dump cinders?

Q. Yes, or about the duties of the fireman at all?

A. Well, the fireman has got his duties; yes.

Q. Did you ever see any rules?

By the COURT.—The question is whether there are any printed or written rules regarding the duties of firemen for this company?

A. Yes, there are printed rules here.

Q. Have you seen them? A. Yes, sir.

Q. When you were at this bridge, do you know whether you had your dampers open or not?

A. I couldn't tell you.

Q. Do you usually have them open when you stop?

A. That depends,—if the engine has a draft, you open your engine, your dampers.

Q. The draft has a tendency to stop when your engine stops,—it is not so strong as when you are running?

A. Generally when you are running, you don't need to.

Q. To have your dampers open?

A. Yes—sometimes it is hard to tell.

Q. You don't recall now?

A. No, I could not.

(By Mr. BORYER.)

Q. You don't know, then, if you had your dampers open or not? A. No, sir, I couldn't tell you.

Q. You were not on the bridge? [195—143]

A. I don't think I was. There might have been some part of the engine on the bridge. I wouldn't say.

(Testimony of Charles Kitsman.)

Q. You say you have seen rules regarding the extinguishing of your fires. I will ask you to look at this rule and ask you if that is the rule you have reference to. (Handing witness paper.)

A. I think I saw that rule when I was up for Heney on the construction.

Q. That is the rule you have reference to?

A. I think I seen it; yes.

Mr. BOYER.—I wish to introduce in evidence the rule just spoken of.

Mr. COBB.—We have no objection.

It is admitted as Defendant's Exhibit Number 1.

Mr. BORYER.—This is in the regular bulletin-book, and I ask permission that a copy may be substituted, so the original may remain in the book.

Request granted.

Mr. BORYER.—I desire to read it to the Jury.

“Cordova, Alaska, July 16, 1910.

To All Engineers, Firemen, Hostlers and All Concerned:

Do not fail to extinguish *All* fire in ashes removed from ash pans.

No excuse will be taken for the burning of ties, or other damage to property, as a result of a failure to do this. Engineers will be held equally responsible with their firemen in this matter.

(Signed) J. R. VAN CLEVE,
Superintendent.”

Q. (By Juror MANTHEY.) Have you any examinations here on this road for firemen, brakemen and engineers? A. No, sir. [196—144]

(Testimony of Charles Kitsman.)

Juror PEDERSEN.—I wish to ask the witness two questions: Will you please describe to the jury all the work the watchman would do upon your engine during the time you were not on duty at Teikhell?

A. Well, when I was watching, why I had to clean the fire, clean out the ash-pan and take care of the engine—that is, keep steam on it and see that it didn't freeze up, if it is in the winter-time.

Q. Did the watchman clean the ash-pan of your engine? A. Yes, sir, he did.

(By Mr. BORYER.)

Q. Before you started to work for this company were you required to give your qualifications?

A. Yes, I had to fill out an application. I went to work for the construction when I went to work here.

Q. And when you came over to the operating department, did you fill out an application?

A. I did, after I went to work for the operating department.

Q. When you commenced working for the Copper River & Northwestern Railway Co. you filled out an application? A. Yes, sir.

Q. Did that application require you to state upon what roads and what experience you had had as a trainman? A. It was supposed to; yes.

Q. Did you fill it out?

A. I filled out some of it; yes.

Q. According to the questions requested in the application? A. Yes, sir.

Q. (By Juror MANTHEY.) Were you examined

(Testimony of Charles Kitsman.)

by a physician—go through the ordinary examination like you do on any other road? [197—145]

A. Here?

Q. (By Juror MANTHEY.) Yes.

A. No, sir.

Q. (By Juror HUNT.) Is there a bridge between 75A and 78? A. Yes, there is one.

Q. In coming this way you make a turn to the left and then another to the right before you reach 75A?

A. Coming this way?

Q. Yes.

A. You turn to the right and then to the left, yes.

Q. First to the left and then another turn to the right, before you reach this bridge?

A. Yes, sir.

Witness excused. [198—146]

[Testimony of Harry N. Wilson, for Plaintiff.]

HARRY N. WILSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Harry N. Wilson.

Q. What position do you hold, if any, with the Copper River & Northwestern Railway Co?

A. Trainmaster.

Q. How long have you been in the employ of the company? A. About three years.

Q. You were in their employ then in the month of December, 1911, and January, 1912?

A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. Have you with you the train sheets showing the time of departure and arrival of trains?

A. Yes, sir.

Q. For those months? A. Yes, sir.

Q. I wish you would state to the jury, beginning with the 12th say, the arrival and departure of trains up the line, from then on down to the first day of January. A. The 12th of December?

Q. Yes.

A. I haven't anything back of the 28th with me, December 28th.

Q. Can you get those for us? A. Yes, sir.

Q. I will ask you to get them.

Mr. BORYER.—What time?

Q. From the tenth or twelfth of December, somewhere along there—now, about the 28th—refer to that.

A. What do you wish to know? [199—147]

Q. I want to know what time the train left here that day. A. Which train?

Q. Did you have more than one train?

A. Yes, sir.

Q. Give us both of them.

A. Train #1 left Cordova at 8:10 on the 28th.

Q. What did that train consist of?

A. Three cars of lumber for Kennecott; one car of lumber for Chitina; one car of lumber for McCarthy Creek; one of merchandise and one coach and one dining-car, engine 102.

Q. Did anything go out ahead of it?

A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. What? A. A rotary.

Q. What rotary?

A. Rotary X1, the small rotary.

Q. That is what is called the little rotary?

A. Yes, sir.

Q. Did that train get through? A. No, sir.

Q. How far did it go?

A. It went to Katalla Junction, Mile 39.

Q. Why didn't it go through?

A. They broke an eccentric strap on the rotary.

Q. What time did it get to Mile 39?

A. At 3:30—that is the time it got there after this accident.

Q. What time did it leave here? A. 8:10.

Q. Do you know where the accident happened?

A. The accident happened at Mile 37.

Q. You have no memorandum of what time it got there? [200—148]

A. I have not; it passed Flag Point at 9:55.

Q. What was done then with that train?

A. Returned to Cordova.

Q. What time did it get back to Cordova?

A. 1:10 on the 29th. This rotary was substituted by rotary X2 from Cordova and they came out to Mile 39; went to Miles Glacier and changed and they went as far as Mile 51. The records show that they returned to Cordova on account of heavy drifts in deep cuts and decided that the small rotary was not capable of handling it and came back and took the large one—went as far as 51 and turned and came back.

(Testimony of Harry N. Wilson.)

Q. Because the small rotary couldn't handle it?

A. That was the decision; yes.

Q. They got back here at 1:10 on the morning of the 29th? A. Yes, sir; the morning of the 29th.

Q. Was there any train out that day?

A. Not on the 29th; no.

Q. They didn't send a train out then until the 30th; is that correct? A. On the 30th; yes, sir.

Q. On the 30th it was really this same train, was it not?

A. Well, it was some of the same train, yes.

Q. What rotary did you send out ahead of it?

A. Rotary X2.

Q. That is the big rotary?

A. That is the large rotary; yes.

Q. That was in front?

A. That preceded the train, yes.

Q. What time did that get out according to your train sheet? A. 12:35.

Q. What time did the train leave, following it?
[201—149] A. 1:05.

Q. Were you on that train?

A. On the rotary; yes, sir.

Q. What position were you in on it?

A. Conductor.

Q. Now, what time did you get back to Mile 51?

A. Going north on this trip?

Q. Yes, going north on this trip?

A. I don't know that I could tell you the exact

(Testimony of Harry N. Wilson.)

time we reached Mile 51. We passed Miles Glacier at 4.30.

Q. How far up is Miles Glacier? A. 49.

Q. You got there at 4.30? A. Yes, sir.

Q. Did anything happen that day to that rotary?

A. At Mile 52 the record shows here it broke key to crosshead and knocked out cylinder-head.

Q. You were conductor of it? A. Yes, sir.

Q. That is what happened?

A. We afterwards discovered that the boiler shaft was broken also.

Q. Then what did you do?

A. We backed up to Miles Glacier, called up the superintendent's office and told our troubles, and backed up to Mile 39 to wait for another rotary from Cordova.

Q. You called up the superintendent's office from Miles Glacier? A. Yes, sir.

Q. The superintendent's office was in Cordova?
[202—150] A. Yes, sir.

Q. What did the superintendent do? What was done then? A. We backed to Mile 39.

Q. What time did you get back there?

A. The record here shows we got there at 9:35.

Q. 9:35 in the evening? A. Yes, sir.

Q. Did you hear from the superintendent after you wired in to him?

A. I think I talked to some of them—they were sending another rotary from Cordova to replace the disabled one.

(Testimony of Harry N. Wilson.)

Q. Do you know what time that rotary reached Mile 39? A. 3:30.

Q. In the morning?

A. In the morning—the following morning.

Q. You don't know what time it left here?

A. It left here at 10:30.

Q. 10:30 in the evening?

A. 10:30 in the evening.

Q. That was the evening of the 30th?

A. Yes, sir, that was the evening of the 30th.

Q. And that took up the train and went on?

A. No, it went on to Miles Glacier and traded rotaries—we took the small rotary and gave them the large or disabled rotary.

Q. That took the place of the other rotary and went on ahead of that train? A. Yes, sir.

Q. Who brought that little rotary up?

A. You mean the entire crew?

Q. Yes. [203—151]

A. Van Trump was conductor. The engineer's name was Buchanan and the pushing engine—they only had one pushing engine—the fireman's name was Higginson.

Q. What became of them?

A. They returned to Cordova on the other rotary.

Q. You were at the scene of the accident in which Mr. Reed lost his life?

A. Yes, sir, I saw it shortly after it happened.

Q. You were conductor? A. Yes, sir.

Q. When the rotary went off, did you go around there? A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. I want you to tell the jury what you saw.

A. Well, the rotary was turned over on its side and the bridge was burned on one side, and the rotary turned over on its side and went down the bank, and the fireman was in the fire-room partly buried with coal, and I don't know that I saw the pilot at all. We went inside the rotary, got in at the top, trying to locate Reed. I didn't see the pilot—he was gotten out very shortly after.

Q. Did you succeed in locating Mr. Reed?

A. No, sir.

Q. Did you observe how much that side of the bridge was burned? A. I did not.

Q. Did you ever observe it?

A. No, not to make any positive statements. I know there was quite a bit of it burned.

Q. You say it was burned on one side?

A. Yes; if I remember right it was burned mostly on one side.

Q. Which side was that?

A. The right side going south. [204—152]

Q. The right side going south? A. Yes, sir.

Q. That would be the left side going north, of course? A. Yes, sir.

Q. Did you go back there at any time after that?

A. Yes.

Q. When was that?

A. I went back there. We went to Chitina and got some jacks and men and went back and tried to raise the rotary—I think we got there on the 5th.

Q. On the 5th of January—you observed the bridge then?

(Testimony of Harry N. Wilson.)

A. It had been burned up pretty bad; they had been trying to get stringers out of it to raise the rotary with and had taken all the good stringers.

Q. Can you tell me what man was the first back there after the accident happened? A. I cannot.

Q. You were not back there until the 5th and they had then torn the bridge up?

A. I think it was the 5th—I am not positive—we came there with men and jacks.

By the COURT.—I am not clear about that.

Mr. COBB.—I asked him if he was back there after they returned to Teikhell or Chitina, and I understood the witness to say that he was back there on the 5th.

The WITNESS.—I am not positive as to the date—it was as soon as we could get back after going to Chitina.

Q. Some days after?

A. Yes, whenever the train came back—fourth or fifth.

Q. You say the ties had been torn up then?
[205—153]

A. Yes, some of the decking had been taken off of the bridge, to get material to raise the rotary with.

Q. Do you know who did that?

A. The roadmaster was in charge of the work. I don't know.

Q. Who was the roadmaster?

A. His name was Stephen.

Q. Where was the section?

A. They were there.

(Testimony of Harry N. Wilson.)

Q. Where was the section-house that had that part of the road? A. 78.

Q. About two and a half or three miles away?

A. About that; yes.

Q. Where were those section men at that time?

A. They were there, I think.

Q. Didn't they go up to Teikhell with you at the time you went north?

A. On the trip prior to that?

Q. They all went up with you? A. Yes, sir.

Q. When did you bring them back?

A. When we came back the night of the first.

Q. The night of the accident you brought them back to 78? A. Yes, sir.

Mr. COBB.—That is all.

(By the COURT.)

Q. How many men were there in the section?

A. I couldn't say.

Q. About how many would you say?

A. About 7 or 8, probably. [206—154]

Cross-examination.

(By Mr. BORYER.)

Q. Why were those section-men taken up there?

A. They were taken to shovel snow and coal and engine and had other work to facilitate—

Q. How is that?

A. They were taken to shovel snow and had other work that was necessary to facilitate the movement of the train.

Q. That was in the line of their duties?

A. I suppose so; yes.

(Testimony of Harry N. Wilson.)

Q. That is the kind of work they do?

A. Yes, sir.

Q. Were you trainmaster at the time of this accident? A. No, sir.

Q. When did you receive your appointment as trainmaster? A. About two months ago.

Q. Were you present at the time that the rotary was broken at 52?

A. I was on the train; yes, sir.

Q. You came back with the train to Mile 39, did you? A. Yes, sir.

Q. How long did you remain at Mile 39?

A. The only way I could tell about that would be from the records here.

Q. Look at your records.

A. We remained there from 8:30 on the night of the 30th until 3:30 on the morning of the 31st—from 9:35 on the night of the 30th to 3:30 on the morning of the first.

Q. Then you got back there about 9 o'clock?

A. Yes, sir.

Q. And stayed there until—?

A. 3:30. [207—155]

Q. The next morning? A. Yes, sir.

Q. Did you see Reed that night? A. Yes, sir.

Q. Where was he?

A. Why, he was working, taking the rotary down. The rotary had to be taken down and run in on one side. He was taking the rotary down and making repairs necessary to bring it to Cordova.

Q. About how long did that take?

(Testimony of Harry N. Wilson.)

A. I couldn't say.

Q. Did he continue working there up to the time that the other rotary came or until you left there?

A. I couldn't say that. I think he did.

Q. Do you know where Mr. Albright was at that time? A. I don't remember.

Q. Was he firing that rotary? A. Yes, sir.

Q. Do you know if he was present there or not?

A. I think that he was part of the time, but I wouldn't say positively.

Q. Do you know where Holden was?

A. I think Holden went to bed shortly after we reached there. He laid down, as I recall.

Q. Now, you moved from there and went to Mile 51, did you not, or Miles Glacier, rather?

A. Yes, Miles Glacier.

Q. Rotary X2 was sent back to town for repairs?

A. Yes, sir.

Q. And rotary XI was sent on towards Chitina?

[208—156] A. Yes, sir.

Q. For the purpose of taking that train?

A. Yes.

Q. Now, do you recall how long you remained at Miles Glacier? A. I do not.

Q. Have you any idea? Doesn't your train-sheet show what time you left there?

A. The train-sheet shows fifty minutes.

Q. That you were there fifty minutes?

A. Yes, sir.

Q. You started then for Teikhell, did you?

A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. Where was your next stop, as you recall?

A. Abercrombie—55.

Q. What did you do there? A. Took water.

Q. About how long were you there, do you know?

A. I couldn't say—we left there at 8:30—it don't state the arrival.

Q. You left there at 8:30? A. Yes, sir.

Q. And you left the Glacier at what time?

A. 6:20.

Q. 6:20 in the morning? A. Yes, sir.

Q. Then you proceeded north toward Teikhell, and do you recall if you made any stops before you got to Teikhell? A. Why, yes, we made several stops.

Q. Of any duration?

A. We stopped to siphon water. [209—157]

Q. At Bridge 75A?

A. Yes. I am not positive whether we siphoned water at Baird River or not, but we siphoned water at Bridge 75A.

Q. You don't recall if you made any stops before stopping in order to return back to Bridge 75A?

A. I can't recall any stops; no.

Q. You did make a stop just on the north side, north end of Bridge 75A?

A. Yes, probably half a mile north.

Q. Then you returned to the bridge 75A, did you?

A. Yes, sir.

Q. For what purpose?

A. To siphon water for the rotary.

Objected to as not cross-examination. Question withdrawn.

(Testimony of Harry N. Wilson.)

(By Mr. COBB.)

Q. Where was your terminal on the north, where did you start for, when you left here on the rotary?

A. Sometimes we go to Teikhell and sometimes to Chitina. It depends largely on the conditions north of Teikhell.

Q. You didn't go further than Teikhell and turn back from there? A. At this time? Yes, sir.

Q. Of course you were in communication with the train-dispatcher, or do you have a train-dispatcher on this road? A. We have one; yes, sir.

Q. Did you have one at that time? A. Yes, sir.

Q. And the running of the train, what it shall be, is all under his supervision, pursuant to telegraphic orders from him? A. Yes, sir. [210—158]

Q. He directs when you start back from that terminal at Teikhell?

A. Yes, as a rule, when the wires are working so we can get into communication with him. There are times when you cannot and you have to use your own judgment.

Q. They were not down on this occasion?

A. Not that I remember, no. They were working, I think.

Q. I don't recall whether I asked you to refer to the time-sheet here and tell the jury what time that train reached Teikhell.

A. The train reached Teikhell at 5:45 on the morning of the 31st.

By the COURT.—Repeat that answer.

A. 5:45 on the morning of the 31st.

(Testimony of Harry N. Wilson.)

Q. The 31st of December?

A. Yes, sir, of the first.

Q. The first of January, you mean?

A. Yes, sir.

Q. Now, repeat that, so there won't be any question about it.

A. The train leaving here on the 30th reached Teikhell at 5:45 A. M. on the morning of January first.

Q. Does your train-sheet show what time the crew that took that train up were called for duty?

A. 11:45.

Q. What day? A. On the 30th A. M.

Q. That is leaving Cordova—leaving Teikhell, I mean?

* A. You mean called for duty to come back?

Q. Yes. A. One P. M.

Q. On the first? [211—159]

A. On the first.

(By Mr. BORYER.)

Q. At the time that you communicate with the dispatcher's office, superintendent's office, do you report conditions and make recommendations at that time?

A. I don't recall at that time whether we did or not.

Q. That is your custom, is it? A. Yes, sir.

Q. Now, you stated that the train-sheet shows that this train and rotary arrived in Teikhell at 5:45 on January first? A. Yes, sir.

Q. Refer to your train-sheet and see what time that train left southbound. A. 4:15 P. M.

(Testimony of Harry N. Wilson.)

Q. You were with the train when she reached Teikhell, were you? A. Yes, sir.

Q. After reaching Teikhell, what did you do?

A. You mean after we reached there going north?

Q. Yes; at 5:45.

A. We went to Mile 105 to the water-tank for water.

Q. After you had gotten water, what did you do?

A. We backed to Teikhell and turned and tied up.

Q. What time would you say that you tied up—does your sheet show?

A. This shows 9 o'clock, 9 A. M.

Q. That you tied up? A. Yes, sir.

Q. Now, as a matter of fact, what time did you retire that morning, about what time?

A. I don't remember what time I retired. [212—160]

Q. Do you know about what time Holden retired?

A. As soon as we arrived at Teikhell.

Q. That is about 5:45?

A. Six o'clock probably.

Q. Do you know what time Reed retired?

A. At the same time.

Q. Do you know what time Albright retired?

A. He retired the same as the rest—the entire rotary crew.

Q. The entire crew? A. Rotary crew.

Q. Where did they retire? A. In the caboose.

Q. Did the caboose remain there while you went north for water?

A. No, I think we took it to 105.

(Testimony of Harry N. Wilson.)

Q. Took it along with you? A. Yes, sir.

Q. Did you take your rotary on up there?

A. Yes, sir.

Q. Who took the rotary up?

A. Mr. Taylor, the watchman, fired; Scott, the brakeman, piloted and I relieved Mr. Reed.

Q. And do you know what time Mr. Holden got up? A. I couldn't say—no.

Q. Do you know what time Mr. Reed got up?

A. I could not, other than that they were called for one o'clock according to the records.

Q. You don't know what time they got up?

A. No, I don't know.

Witness excused.

(At 11:10, recess for ten minutes.) [213—160]

[Testimony of August Thiele, for Plaintiff.]

AUGUST THIELE a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. August Thiele.

Q. Where do you reside?

A. At the Rainier Grand Hotel, Cordova.

Q. What is your occupation? A. Fireman.

Q. On what?

A. The Copper River & Northwestern Railroad.

Q. How long have you been fireman on the Copper River & Northwestern Railroad?

A. Started in on May 1, 1910.

Q. Since 1910? A. Yes, sir, since 1910.

(Testimony of August Thiele.)

Q. Were you in the employ of the Copper River & Northwestern Railway Co. in the month of December, 1911, and January, 1912? A. Yes, sir.

Q. Were you employed at that time on the train leaving here about one o'clock on the 30th of December, 1911? A. Yes, sir.

Q. What were you doing on that train?

A. I was firing engine 23.

Q. Where was that engine in the train?

A. The first pusher—it was right behind the rotary.

Q. Did you work continuously after you left here until you reached Teikhell? A. Yes, sir.

Q. What time was it, or do you recall, when you reached Bridge [214—162] 75A going north?

A. Well, I don't recall the exact time. The train-keeper can tell you the exact time.

Q. About 9 o'clock on the evening of the 31st?

A. Yes, sir.

Q. You had been on duty up to that time—

Mr. BORYER.—We object to that as leading.

Mr. COBB.—It is leading but it is preliminary and these facts have been testified to.

By the COURT.—Those are matters that were referred to by the trainmaster—the facts stated there are probably the true facts, as you understand it?

Mr. COBB.—As I understand it they are.

By the COURT.—You may assume those then.

Mr. COBB.—I assume they got there at 9 o'clock or a little after, on the 31st.

Q. You had been employed continuously up to that

(Testimony of August Thiele.)

date, up to that hour?

Mr. BORYER.—We object to that as leading. If he wants to know what the witness did, he should have him state what he did.

By the COURT.—The objection will be sustained. I am assuming they arrived there at 9 o'clock and the witness should state what he remembers of his own personal knowledge—what he did when he got to Teikhell.

Q. What were you doing from the time you left here until you reached Bridge 75A?

A. I was firing engine 23.

Q. Continuously? A. Continuously.

Q. Do you recall how long you were there at that bridge? [215—163]

A. I reckon about an hour—a little more, maybe.

Q. State whether or not you passed over a bridge with the entire train, including the local, when you first reached it.

A. We passed over the bridge—I couldn't say whether the local passed over it or not.

Q. How far beyond did you go?

A. About half a mile.

Q. How close was the local following?

A. I couldn't say the exact distance very close.

Q. About how far?

A. I didn't look back at that time, I couldn't say.

Q. After you had passed over the bridge, state whether or not the train backed back.

A. We backed back—I don't know about the local.

Q. I am referring to the train you were on.

(Testimony of August Thiele.)

A. Yes, sir, we backed back on to the bridge.

Q. Did you stop on the bridge as you backed back?

A. Yes, sir.

Q. And you were there about an hour?

A. I should judge about that time. I couldn't say the exact time.

Q. What were you doing?

A. I was standing by the engine. I was keeping up steam for the engine.

Q. Do you know what they backed back for?

A. Taking water for the rotary.

Q. On what engine? A. On the rotary.

Q. After they had taken water, state what was the next thing [216—164] done to the train—which way did it go?

A. If I recollect right we backed up and took coal on the rotary.

Q. Then you backed back still further south of the bridge and took coal? A. Yes, sir.

Q. After you took coal, what did you do?

A. We proceeded on to 78.

Q. And on your way to Teikhell? A. Yes, sir.

Q. That is where the train started for?

A. Yes, sir.

Q. When you got to Teikhell at 5:45 on the morning of the first what did you do?

A. I went right to bed.

Q. What time were you called?

A. 12:30, I think it was, or one o'clock.

Q. You left there at what time—it was at 4:45?

(Testimony of August Thiele.)

Mr. COBB.—I am assuming those figures are correct.

Mr. BORYER.—No objection.

Q. When you came back do you recall at what time you reached that bridge again? A. Yes, sir.

Q. Do you recall taking up the section-men?

A. I recall taking up the section-men at 78.

Q. From 78, as you went north? A. Yes, sir.

Q. They were taken up? A. Yes, sir.

Q. Now, when you returned to this bridge did anything happen? [217—165]

A. The first thing I know, I just got through putting coal in the fire-box and was in the act of going up to the side of my engine, and she hit, and I thought the rotary was off the track, and Engineer Lee spoke up and said, "By God! Somebody is killed!" Something like that, and he jumps off the engine and I followed him.

Q. Where did you go?

A. Up to the rotary.

Q. And when you got around there what did you see?

A. I heard Herman holler, I think it was, or somebody holler, and by that time Mr. Kitsman was up there and we tried to open the door on the tank, on the coal-tank, and we opened that and got the coal out and Mr. Wilson climbed into the tank and got Herman Albright out, and I went and got an ax and tore the cab off the rotary and Mr. Reed, about the location where Reed was over toward the boiler, and by that time the whole gang, passengers and crew,

(Testimony of August Thiele.)

were around there helping.

Q. Could you locate Reed?

A. We located him after awhile.

Q. Whereabouts was he?

A. Just about opposite the throttle of the rotary.

Q. Underneath the rotary?

A. The way it looked to me; yes, sir.

Q. Did you yourself locate him?

A. A certain gentleman, a passenger there, located him first by feeling his hand and I felt it afterwards.

Q. You felt down in the water and got hold of his hand? A. Yes, sir.

Q. Could you get him out?

A. No, sir. [218—166]

Q. You did, though, get hold of his hand?

A. Yes, sir.

Mr. COBB.—That's all.

Cross-examination.

(By Mr. BORYER.)

Q. You left here on the rotary X2, did you, on the 30th? A. On Engine 23.

Q. That was attached to rotary X2? A. Yes.

Q. While you were at Mile 39, what were you doing?

A. I was on the engine, looking after the engine, keeping the fires and steam up.

Q. Did you clean your fires while you were there?

A. I don't think I did—I wouldn't swear to it, but I don't believe I did.

Q. Then you left there and went to Miles Glacier?

A. Yes, sir.

(Testimony of August Thiele.)

Q. About how long did you remain at Miles Glacier? A. Just about an hour, I guess.

Q. Did you clean your fires there? A. No, sir.

Q. Then you worked through the canyon?

A. Yes, sir.

Q. You took water at 55? A. 55.

Q. Did you clean your fires there?

A. I don't think I did.

Q. Then the next stop was the stop just after you had crossed Bridge 75A?

A. If I recollect right, we took water at 67 Bridge.

[219—167]

Q. You think you took water at 67 Bridge?

A. If I recollect right.

Q. Do you recall doing anything there?

A. Nothing except siphoning water.

Q. Just siphoning water? A. Yes, sir.

Q. About how long were you there?

A. I should judge about an hour or two hours, I guess.

Q. And you were siphoning water?

A. Yes, sir.

Q. At 67? A. Yes, sir.

Q. Did you clean your fires there? A. No, sir.

Q. About what time did you get to this point, 67?

A. I couldn't say. I didn't keep track of the time.

Q. You got there about 11 o'clock?

A. Somewhere around there.

Q. And stayed there about an hour and a half?

A. Something about that time.

(Testimony of August Thiele.)

Q. Taking water? A. Yes, sir.

Q. How long does it ordinarily take you to take water for the three engines, the rotary and two engines?

A. Thirty or forty minutes to an engine, I guess.

Q. And you stayed there about an hour and a half and took water? What were the weather conditions at that time?

A. I think they were pretty cold that night—I don't remember about the exact condition, but I think it was snowing a little, if I recollect right.

[220—168]

Q. The snow was light there? A. Yes, sir.

Q. Not very deep?

A. I don't know. The snow was deep in the cut, right on the bridge, at that time. I think it was snowing a little where we were taking water.

Q. Did you clean your fire there? A. No.

Q. You didn't clean your fire then from the time you left? A. No, sir.

Q. You had an opportunity to clean your fire there, did you?

A. I did not think it was necessary to clean the fire there.

Q. You didn't think it was necessary to clean your fire there? A. No.

Q. And you are certain you did not clean your fire there? A. No, sir.

Q. How far is it from there to bridge 75A?

A. 67 Bridge is at Mile 68, I think.

Q. At the end of Mile 67? A. 68.

(Testimony of August Thiele.)

Q. Then it would be seven miles from there to the other bridge? A. About seven or eight miles.

Q. How long did it take you to reach there, up to bridge 75A?

A. That night? It takes quite a while. The snow was pretty hard bucking. I don't recollect just exactly how long it took us, but I think you can find out there.

Q. You think you were on bridge 75A for something like an hour and a half?

A. An hour or an hour and a half, I guess—something like that.

Q. Taking water there?

A. Yes, taking water on the rotary. [221—169]

Q. What were you doing while they were taking water?

A. I was tending to the fire. They had some hose coupled on Engine 23 and discharge hose into the rotary tank.

Q. Will you repeat that?

A. They had the steam hose from the siphon coupled on to Engine 23 and discharge hose into the rotary tank—to siphon it up into the rotary tank.

Q. Where was your engineer?

A. He was coupling up the steam hose on the engine.

Q. Who was your engineer? A. Mr. Lee.

Q. Were you on the bridge at the time?

A. Yes, sir.

Q. Your engine was on the bridge?

A. Yes, sir.

(Testimony of August Thiele.)

Q. Are you certain you did not clean your fires there? A. Yes, sir.

Q. You are certain you did not dump your pan there? A. Yes, sir.

Q. While you were working there, did you see the rotary? A. I seen the tank from the engine.

Q. Were you talking with any of the rotary crew?

A. No, sir.

Q. How came you to connect up with the rotary?

A. It would be so much handier with the steam hose. The engine is right behind the rotary and we could connect up right there and siphon into the rotary.

Q. Who told you to connect up?

A. I didn't connect up—Mr. Lee, the engineer, connected up.

Q. Did you see Holden there at that time?

A. No, sir. [222—170]

Q. Did you see Reed there at that time?

A. No, sir.

Q. Did you see Albright there at that time?

A. I didn't get off the engine there—I didn't see anybody.

Q. You left there and went on north then?

A. Yes, sir.

Q. You arrived in Tiekhell about 5:45?

A. Yes, sir.

Q. And went straight to bed? A. Yes, sir.

Q. Who took charge of your engine?

A. The night watchman, Mr. Taylor.

Q. Did Mr. Lee go to bed with you?

(Testimony of August Thiele.)

A. I don't recollect whether we went to bed together or not—he went to bed right there.

Q. All of the rotary crew went to bed then?

A. I presume so; yes.

Q. Except Mr. Wilson?

A. I didn't pay much attention to them at that time—I just went in there and took my clothes off and went to bed.

Q. Were you talking to any of them in there?

A. I don't recollect that I did. I might have said a word or two but I don't recollect it.

Q. Do you remember if Reed was with you?

A. No, I do not.

Q. Do you remember if Albright was with you?

A. No, sir.

Q. Remember if Holden was with you?

A. No.

Q. You don't recall anybody that came back?

[223—171]

A. No, I didn't pay any attention to them.

Q. You remained in bed until what time?

A. About 12:30 or 40 we were called.

Q. And after that you went and had your lunch?

A. Yes, sir.

Q. And stayed there until what time?

A. I went on the engine somewhere around one o'clock, I should judge—a little after.

Q. When you reached the bridge coming down at the time of this accident, did you notice the bridge—after the accident? A. After the accident?

Q. Yes.

(Testimony of August Thiele.)

A. No, sir, I don't think I did.

Q. Did you see the bridge?

A. I got a slight glance of it.

Q. Did you see any fire?

A. There was a little fire on the further end, on the south end.

Q. Still burning, was it?

A. Still burning, yes, sir.

(By Mr. COBB.)

Q. About how long is that bridge?

A. I should judge 120 or 30 feet, something like that—more than that.

Q. This fire you saw was at or near the south end?

A. On the end exactly right on the end somewhere around there.

Q. Somewhere around the south end?

A. Yes, sir.

Q. Do you recall where you did dump your ashes on that northern run? [224—172]

A. I don't think I dumped my ashes at all on that trip—left that for the watchman at Teikhell.

Q. As a matter of fact, after the second day out you were pretty tired, were you not?

A. Well, yes.

(By Mr. BORYER.)

Q. Did you notice any fire on the bridge at any other part except the south end?

A. No, sir, I did not.

Q. Did you notice the end of the bridge where the rotary had gone down?

A. No, sir; it was pretty dark that night and you

(Testimony of August Thiele.)

couldn't see. The tank of the rotary was standing up—I didn't pay much attention to the place.

Q. You couldn't see?

A. No, I could just see the flame.

(By Juror MANTHEY.)

Q. Did you go to bed just as soon as you got to Teikhell or did you help switch your train around?

A. After we got word to tie up I went to bed.

Q. Did you get word to tie up before you switched your train around or after?

A. I didn't switch any. They just went around the loop, after we got our water and spotted for coal, and tied up.

Witness excused. [225—173]

[Testimony of George Scott, for Plaintiff.]

GEORGE SCOTT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. George Scott.

Q. Where do you reside? A. Cordova.

Q. What is your occupation?

A. Railroad brakeman.

Q. In whose employ?

A. Copper River & Northwestern Railroad Co.

Q. How long have you been in the employ of the Copper River & Northwestern Railway Co.?

A. August, 1910.

Q. You were in their employ then during the month of December, 1911, and January, 1912?

(Testimony of George Scott.)

A. Yes, sir.

Q. Were you on that train that left here for Teik-hell on the 30th of December, 1911?

A. I was; yes, sir.

Q. In what capacity were you at work on that train? A. Brakeman on the rotary.

Q. Brakeman? A. Yes, sir.

Q. What are the duties of the brakeman?

A. To protect the rear of his rotary so they don't have a collision; help out in general around wherever necessary.

Q. Where did you stay?

A. In the rotary caboose.

Q. Where is that, the rotary caboose, with reference to the [226—174] pusher engines?

A. Behind the last pusher.

Q. There are two pusher engines?

A. If there is only one, it is behind the first one—it is at the rear of the fleet.

Q. Do you recall reaching this bridge at 75A?

A. Yes, sir.

Q. About 9 o'clock on the morning of the 31st?

A. Somewhere around there.

Q. Now, state what you had been doing from the time you left here until you got to that bridge, in a general way.

A. I had been protecting the rotary; that is all I had been doing.

Q. Were you on duty continuously?

A. Yes, sir.

Q. When you reached this bridge, state to the jury

(Testimony of George Scott.)

whether or not you passed it. A. We passed it.

Q. How far? A. About half a mile north.

Q. Then what was the next thing that happened?

A. Went back to Bridge 75A for water.

Q. How long were you on that bridge taking water, as near as you can recall?

A. I don't just remember now.

Q. You were pretty tired and can't remember just what did happen at that time?

A. I will tell you—with my job I can get sleep. I can go a long while on the flagging job on the rotary without sleep—I can get enough sleep on the flagging job on the rotary.

Q. You can get some sleep? [227—175]

A. Yes, I can.

Q. You were sleeping at this bridge?

A. No, sir.

Q. After you took water what happened?

A. Why, we went a little further back and coaled up the rotary.

Q. Went back still further south on the bridge?

A. Yes, sir.

Q. And took coal—from what did you take the coal?

A. From some coal that had been unloaded from a car on the local train.

Q. How close was the local following you?

A. As close as it was safe.

Q. You were watching out on the rear end all the time for this local? A. Yes, sir.

(Testimony of George Scott.)

Q. Now, as you passed north again after coaling up, were you on the rear of your caboose?

A. Yes, sir.

Q. Did you see any fire on that bridge as you went over? A. Not as I went over it; no, sir.

Q. If it had been burning much you would have seen it? A. I would have seen it probably.

Mr. BORYER.—What time have you reference to?

Mr. COBB.—When they were going north, after they had coaled up.

Q. And then you went on to Teikhell?

A. Yes, sir.

Q. Reached there at 5:45 on the morning of the first? A. Somewhere around that.

Q. Did you go to bed right away?

A. No, sir. [228—176]

Q. What did you do?

A. Wilson, Taylor and myself took the rotary up to Mile 105 to a water-tank.

Q. And watered it there? A. Yes, sir.

Q. What time did you get back?

A. I don't remember.

Q. Did you go to bed then?

A. After we turned the loop and spotted the rotary for coal we went to bed.

Q. About what time was that?

A. I don't remember what time we tied up. The train-sheets will show what time we tied up.

Q. How long was it before you were called?

(Testimony of George Scott.)

A. I think we were called for one o'clock that afternoon.

Q. You went on duty, then, at one?

A. Yes, sir.

Q. Do you know why you didn't get out of there before 4:15?

A. They were making some repairs to the rotary, as I understood it.

Q. Who was doing that?

A. The engineer; the rotary crew.

Q. Mr. Reed and the rest of the crew on the rotary? A. I think so.

Q. As you came back to Bridge 75A, between 7:30 and 7:35 on the evening of the first, and you got to this bridge, did anything happen?

A. The rotary went through the bridge.

Q. What was the first thing that called your attention to it, as you remember? [229—177]

A. That something was wrong?

Q. Yes.

A. The air went into the emergency.

Q. Did you go around to the front?

A. Yes, sir, I did.

Q. Tell the jury what you saw when you got around there.

A. The rotary was lying off on her side that way (indicating).

Q. Which side?

A. Why, she was headed south and would be to the right side and it was on a kind of a slant, headed down—that is the way it was.

(Testimony of George Scott.)

Q. What else? Go ahead—tell what you know about it. Did you see Albright?

A. I got moving around to see what kind of shape the boys were in and I got an answer from Holden in the pilot-house—the rest of the boys I couldn't get any word from them, so when I heard Holden's voice, I started getting him out. Took him back to the coach, and in the meantime they had found, they had started to work on Albright and got him out. Reed, it was impossible to get out.

Mr. COBB.—That's all.

Cross-examination.

(By Mr. BORYER.)

Q. You say you reached Teikhell at 5:45 in the morning or about that time?

A. If that is the time on the train-sheets—I can't remember the hours and minutes.

Q. But when you did reach there, who took charge of the rotary? A. Harry Wilson.

Q. What did he do on the rotary?

A. He ran it. [230—178]

Q. What did you do? A. Pilot.

Q. Who took charge of the fires?

A. Warren Taylor, the night watchman.

Q. What became of Reed and Holden and Albright? A. Went to bed, I suppose.

Q. They didn't remain on the rotary?

A. No, sir.

Q. Then you and Wilson and Taylor took the rotary around the loop, did you? A. We did.

Q. And went up to the water-tank and watered?

(Testimony of George Scott.)

A. Went to the water-tank first and around the loop afterwards.

Q. First went to the water-tank and then came back and went around the loop and had your trains headed for Cordova? A. Yes, sir.

Q. You are certain that Reed and Holden and Albright did not remain on the rotary after it reached Teikhell? A. No, sir.

Q. They did not? A. They did not.

Q. What engine pushed you up there?

A. The same engines we had left town with—21 and 23, I think it was.

Q. You say you were on duty all the time after you left Cordova until you reached Teikhell?

A. Yes, sir.

Q. You didn't fall asleep at your post?

A. I can get sleep on the flagging job.

Q. You had plenty of sleep, then? [231—179]

A. I had plenty; yes, sir.

Q. And you were not sleeping when you should have been working? A. No, sir.

Q. Would you sleep when they would stop?

A. If there was nothing for me to help them out with I would lay down and catch a little sleep.

Q. When they stopped at Bridge 75A taking on water, did you take a nap then?

A. Not at that time. I was helping them with the siphon hose out there and told the local to unload some coal for us and spotted the local for coal when she backed up to take the coal.

Q. What were you doing in connection with the

(Testimony of George Scott.)

siphoning of the water?

A. I just helped them get the siphon hole open and the siphon started, and then I went back to the local to tell them about the coal.

Q. What side of the stream did you take the water from—the upper side of the bridge or the river side of the bridge?

A. From the river side, or right-hand side going north.

Q. The right-hand side going up?

A. Going north; yes.

Q. Did you see Reed there? A. I did.

Q. See Albright? A. No, sir.

Q. See Holden? A. No, sir.

Q. See Lee?

A. He was sitting on top of his engine at the steam valve, to steam into the siphon when we had it ready.
[232—180]

Q. Just what work were you doing in regard to helping to get this water in?

A. If I remember right, we used the steam hose to get our siphon hole down through the ice. I handled the steam hose awhile and probably shoveled a little snow to connect this steam hose with some of the engines,—I don't know just which ones it was.

Q. Connect with what engines?

A. 23—I think it was the head pusher we had the steam connection to.

Q. Could you see the rotary? A. Yes, sir.

Q. Could you see the bridge? A. Yes, sir.

Q. Could you then see men if they were around

(Testimony of George Scott.)

there? A. Yes, sir.

Q. You could see what Lee was doing, could you?

A. I could.

Q. You could see what the men were working, trying to get this hole through the ice, were doing?

A. Yes, sir.

Q. What distance could you see? How far was the hole from the position where Lee was on his engine?

A. That probably would not have been over 35 or 40 ft. at the most.

Q. You could see Lee from the hole—on his engine? A. Yes, sir.

Q. Could you distinguish who it was?

A. Well, I knew who it was.

Q. You could tell who it was? [233—181]

A. I knew it would be him,—it was his engine. No one else would be there.

Q. Are you certain it was not Thiele?

A. There is a little difference in the size,—that would be one way I could tell. I could tell it was a large man,—larger than Thiele is.

Q. Now, let us see if you have that correct. You were headed north, going towards Chitina, and you siphoned water from the right-hand side of the bridge, going north? A. Yes, sir.

Q. The hole that you made to siphon this water through was about how far from the rotary?

A. Just a little ways to the side of the bridge.

Q. About how far would you say, approximately?

A. Probably ten or twelve or 15 ft., somewhere around there.

(Testimony of George Scott.)

Q. What was about the height of that bridge from the ice?

A. I couldn't just say what the height of that bridge was. It was taller than a man's head.

Q. And do you know what position the first pusher engine was in at the time they were taking this water—was that on the bridge?

A. I am pretty sure it was.

Q. How about the next one—the second pusher?

A. The second pusher was not entirely on the bridge, I don't think.

Q. How about the caboose?

A. The caboose was off the bridge.

Q. When you stopped on the bridge what did you do—what was your first act?

A. I dropped off the caboose just before we hit the bridge and [234—182] got down to where the siphon had hit when they threw it off the rotary.

Q. Where was the local?

A. The local was back to clear—she was back far enough to clear us at the time.

Q. How far back was she?

A. I don't just remember how many car lengths or anything like that, but it was back far enough so we could stop at the siphon hole without touching the local.

Q. And how long had she been back there?

A. Probably three or four minutes before we got there.

Q. Had she crossed the bridge?

A. The second time she crossed the bridge.

(Testimony of George Scott.)

Q. She followed you up?

A. She followed us up and backed back over it.

Q. To push back? A. Yes, sir.

Q. Now, then, when the rotary pulled out which side of the stream did you go on to the rotary—which side of the bridge? I mean, the north side or the south side?

A. I don't just remember which side I did go on. We went from the bridge back to take the coal.

Q. Did you go on your rotary to ride back?

A. I rode the caboose back.

Q. You rode the caboose back to the point where you took the coal? A. Yes, sir.

Q. Now, after you took this coal, what did you do?

A. Started north again.

Q. Was the local hooked to you? A. No, sir.

[235—183]

Q. How close was she to you when you started, when you both started—did you see her start?

A. No, I don't remember whether I saw her start or not.

Q. You started first, did you?

A. We started first, yes, sir.

Q. Did she start right after you started?

A. That I couldn't say. I don't just remember whether she started immediately or whether she laid back there a few minutes.

Q. How far were you from the bridge where you took this coal? A. Probably 100 yards or so.

Q. Then you had started and your rotary was going—where did you go when you started your rotary?

(Testimony of George Scott.)

A. Stood out on the platform of the caboose for awhile.

Q. And how close was the local to you,—could you see her? A. She was in sight back there; yes.

Q. Were you watching her? A. I was.

Q. Why were you watching her?

A. I just stood on the platform there to see when she would start, to get a line on her for my future work.

Q. It was your duty to protect that end of the train against the local? A. It was.

Q. And were you standing there in order to protect her against that train?

A. Just as I said—to see when she started.

Q. You were standing there and watching?

A. Yes, sir.

Q. If she had not started there was no use to watch her?

A. It was her duty to start and follow us. [236—184]

Q. You were expecting her to follow you?

A. Yes, I was.

Q. Then you were watching the engine, were you, of the local? A. I was.

Q. And you stood there and watched it for how long?

A. I don't remember how long I did watch her.

Q. For half a mile, would you say?

A. I don't think you could see for half a mile there.

Q. While you were traveling half a mile up the

(Testimony of George Scott.)

track, I mean? A. Probably.

Q. And you had your eye on the engine?

A. Most of the time.

Q. That was your main object, wasn't it?

A. Yes, sir.

Q. Your duty? A. Yes, sir.

Q. And as you went over the bridge were you thinking more about the bridge or more about the engine?

A. I was thinking more about the engine.

Q. Behind you? A. Yes, sir.

Q. And that is what you had your eye on, wasn't it? A. Mostly.

Q. Then, as a matter of fact, you didn't notice the bridge closely, did you?

A. Naturally a man will glance down on the bridge going over it if you are standing on the caboose.

Q. And you glanced down? A. I did.

Q. And that is all you did? [237—185]

A. Yes, sir.

Q. And then when you state if there had been any fire on there you would have seen it, you didn't mean to say that you were looking closely for fire?

A. No, I wasn't looking closely for fire.

Q. There might have been fire there and you would not have noticed it?

A. There might have been.

(By Mr. COBB.)

Q. Who was the engineer on the local?

A. Mr. Frank Townsend.

Q. Engineer or conductor? A. Engineer.

Mr. COBB.—That will be all.

Witness excused.

Whereupon Court took a recess until 2 P. M.
[238—186]

**[Testimony of Harry N. Wilson, for Plaintiff
(Recalled).]**

HARRY N. WILSON, recalled by the plaintiff.
(By Mr. COBB.)

Q. What is your name?

A. Harry N. Wilson.

Q. You have the train-sheets that were asked for this morning, the time-tables? A. Yes, sir.

Q. I wish you would turn to them, beginning with the train on the 12th, say, and tell the jury as you come to it how long it took each train to get through to Teikhell,—from the 12th up to the 30th.

A. What train do you refer to—all trains?

Q. Yes, each train that went through.

A. The rotary on the 12th left Teikhell at 7:35 A. M.; arrived at Cordova at 4:50 P. M.

Q. That was the south-bound train?

A. That was the south-bound train.

Q. When was the next train out, northbound—when did that train go up?

A. That train went up on the 11th.

Q. What time did it leave here?

A. Left Cordova at 7:35 A. M.; arrived at Teikhell at 5:20 P. M.

Q. Left here when? A. 7:35 A. M.

Q. And reached Teikhell when?

(Testimony of Harry N. Wilson.)

A. At 5:20 P. M.

Q. Did you have a train out on the 13th?

A. We had a train south on the 13th.

Q. When was your next train north?

A. The next through train north was on the 15th.

Q. How often were you running trains in December, 1911, regular [239—187] trains?

A. What do you refer to? How many times? How often we were running them?

Q. Yes.

A. We were supposed to be running three times a week—three trips a week.

Mr. BORYER.—I suggest inasmuch as Mr. Wilson was not in the dispatcher's office at that time it might be better to bring the dispatcher on. He is more familiar with his own time-sheets.

By the COURT.—Have you the dispatcher here?

Mr. BORYER.—Yes, sir.

Mr. COBB.—I don't care how we get at them, but those sheets show the time.

Mr. BORYER.—They show the time, but Mr. Wilson may not be familiar with the manner in which they are kept by the dispatcher.

Mr. COBB.—Then I will withdraw Mr. Wilson.

Mr. BORYER.—Mr. De Leo is here and you can put him on.

Mr. COBB.—When we get a recess I will get Mr. De Leo and go through it with him and I can get through with it very quickly, and I will withdraw this witness.

Witness excused.

Mr. BORYER.—I would like to recall Mr. Kitsman for a moment.

By the COURT.—Very well. [240—188]

[Testimony of Charles Kitsman, for Plaintiff (Recalled—Cross-examination).]

CHARLES KITSMAN, recalled for further cross-examination:

(By Mr. BORYER.)

Q. I believe you stated on direct examination, at the request of one of the jurors, that no examination was made of the men when they applied for positions with the company.

By the COURT.—The question was as to physical examination. What was your question, Mr. Manthey—as to physical examination?

Juror MANTHEY.—Physical examination; yes, sir.

Witness excused.

[Testimony of W. George Bibber, for Plaintiff.]

W. GEORGE BIBBER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name?

A. George Bibber—W. G. Bibber.

Q. What is your occupation?

A. With the train crew—brakeman.

Q. How long have you been in the railroad service?

A. About four years.

Q. Are you familiar with rotary snow-plows as

(Testimony of W. George Bibber.)

they are constructed? A. Yes, sir.

Q. Do you know these snow-plows that were used in the month of December, 1911, by the Copper River & Northwestern Railway Co.—what was the type of them. [241—189]

A. It was the American Locomotive Works—built by them, I suppose.

Q. Now, I hand you an illustrated catalogue issued by the American Locomotive Company of New York City of rotary snow-plows, and call your attention to the cut on page 4, and ask you if that is the type of snow-plow they were using here.

A. Yes, I think it is about the same.

Q. Now, I want you to explain to the jury from that cut—just go up there where they can all see it.

A. You want me to explain the rotary to them?

Q. Yes. Where each man worked and how the rotary was divided into compartments, if it was so divided.

A. Well, this is the pilot-house here; this is where the pilot stays. There are two doors back of him but they are generally open in the back. The engineer is in here by this door. The fireman works back here by his water injectors, right in here, back of the engineer. The engineer is over here. Clear over to the pilot-house is a runway about three feet wide. That is as near as I can explain that to you. The throttle is right here by the engineer. The engineer runs by a signal from the pilot in the pilot-house. He can't see out ahead here very well.

No. 2301

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

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Plaintiff in Error,
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Mrs. E. A. REED, as Administratrix of the Estate
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VOLUME II.
(Pages 241 to 477, Inclusive.)

Upon Writ of Error to the United States District Court
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(Testimony of W. George Bibber.)

Q. Are the engineer and fireman in different compartments?

A. Well, the fireman is supposed to be back here—between the tank and fire door is where he is most of the time, and the injectors are back of the fire here, back of the engineer, and his duty is to attend to the injectors. He looks after that and the fire also.

Q. Where does the pilot look out from?

A. He has two windows in front here, one on each side. [242—190]

Q. Over the hood?

A. Over the hood, yes, sir.

Q. Now, turn to the next cut there and explain how the snow is thrown from them.

A. Well, there is one that is in motion, working. That snow is thrown to the right. The pilot works on this side now but there are times you can't see a thing in here—this pilot can't. Sometimes he goes for miles and can't see nothing. Take soft snow, making six or eight miles an hour, that snow just works with the wheel on both sides.

Q. The snow is thrown out then at an angle, forward? A. Yes.

Q. Whether to the right or left?

A. Forward and sometimes blows back. It depends on the wind.

Q. What I mean is, it is not thrown out horizontally, to one side?

A. Yes, it does, out of the wheel; the wheel takes up from both sides—it follows the wheel around.

(Testimony of W. George Bibber.)

Q. This last cut you refer to is on what page?

A. Page 6.

Mr. COBB.—I ask that pages 4 and 6 be admitted in evidence as illustrating this witness' testimony.

(The pages are torn from the book and marked Plaintiff's Exhibit "C" and Plaintiff's Exhibit "D" and admitted in evidence, without objection.)

(By Mr. BORYER.)

Q. Where did you get this book?

A. I got it out of Mr. Cobb's hand here a minute ago.

Q. Where did you get it before you got it from Mr. Cobb's hand.

A. I never saw it before. [243—191]

Q. You say you are a brakeman? A. I was.

Q. When? A. Ever since I have been here.

Q. Are you still a brakeman? A. Yes, sir.

Q. How long have you been braking?

A. About three years and a half, I guess. I have done some running here.

Q. But you are still rated as a brakeman?

A. Yes, I think so.

Q. You have had some experience around rotaries? A. Yes, sir.

Q. In rotaries? A. I was a pilot, that is all.

Q. Have you ever been in them when they were working? A. Yes.

Q. Have you been in the pilot-house when they were working? A. Yes, sir.

Q. And you say that the snow that is thrown by the wheel oft-times makes it difficult for the pilot to

(Testimony of W. George Bibber.)

see in front? A. Yes, sir.

Q. Has that been your experience when you were on the rotary—you have seen that for yourself, have you? A. Yes, sir.

Q. Do you know anything about the operation of a rotary, the running of it? A. I do in a way; yes.

Q. What do you mean by in a way?

A. From what little experience I have had as pilot.

[244—192]

Q. On a rotary? A. Yes, sir.

Q. Were you ever pilot on a rotary?

A. Yes, sir.

Q. Where? A. Here on this road.

Q. Where else? A. On the Great Northern.

Q. How long were you pilot on the Great Northern? A. About a month and a half.

Q. Were you on this train that went up when this accident happened? A. Yes.

Mr. BORYER.—That is all.

(By Mr. COBB.)

Q. Is there anything regarding this trip up and the accident happening there that you can testify to that has not been already testified to in the case?

A. I don't think there is.

(By Mr. BORYER.)

Q. Do you know all that has been testified to in the case? A. Well, I have heard it all.

Q. Do you know whether it was all true?

A. I couldn't say.

Witness excused. [245—193]

[Testimony of Warren Taylor, for Plaintiff.]

WARREN TAYLOR, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Warren Taylor.

Q. Where do you live? A. Cordova.

Q. What is your occupation? A. Fireman.

Q. On what road?

A. The Copper River & Northwestern.

Q. How long have you been in the employ of the Copper River & Northwestern Railway Co.?

A. Off and on very nearly two years and a half.

Q. Were you in the employ of the Copper River & Northwestern Railway Co. in December, 1911, and January, 1912? A. Yes, sir.

Q. In what capacity?

A. As watchman on the rotary fleet.

Q. Were you watchman on the rotary that went out ahead of the train on the 30th of December, 1911?

A. Yes, sir.

Q. What were the duties of the watchman on that train?

A. Well, when they tied up, to clean the fires, clean the ash-pans, keep any exposed pipes from freezing up, calling the crews when it was ready.

Q. Where did you stay? A. In the caboose.

Q. Do you recall the circumstances—the time, I believe, is agreed upon—when you got to Bridge 75A? [246—194] A. Yes, sir.

Q. State whether or not you passed the bridge.

(Testimony of Warren Taylor.)

A. Yes, sir.

Q. About how far beyond the line did they go?

A. I should judge about a mile.

Q. Did they come back? A. Yes, sir.

Q. Do you know why they came back?

A. Yes, sir.

Q. Why? A. To get water.

Q. Do you know why they couldn't get water from one of the other engines?

A. The siphon hose was frozen up.

Q. How far back did you back before stopping—to what point?

A. You mean from where they got stalled, ran out of water?

Q. Yes. A. They backed to 75A, to the bridge.

Q. Did they stop on the bridge? A. Yes, sir.

Q. About how long did they stay there?

A. About an hour, maybe better than an hour.

Q. Then where did they go to?

A. In the meantime they had been unloading some coal off the local and backed up and loaded the coal on to the rotary.

Q. South of the bridge?

A. South of the bridge to a snowbank.

Q. And after they got the coal, where did they go to? A. 78.

Q. Stopped at 78? [246½—195] A. Yes, sir.

Q. Do you recall how long they stayed there?

A. I should say they were there an hour and a half or two hours.

Q. What is at 78?

(Testimony of Warren Taylor.)

A. A section camp and water-tank.

Q. That is the nearest section-house there, is it?

A. To the place of the accident? Yes, sir.

Q. How far down this way is it before there is another section-house? A. Mile 55.

Q. When you left there, do you know whether the section-men went up with you or not?

A. Yes, sir.

Q. You took them all to Teikhell? A. Yes, sir.

Q. You got into Teikhell at 5:45 the next morning?

A. Yes, sir.

Q. What did you do as soon as you got in there?

A. Went on up to the water-tank.

Q. With the rotary? A. With the rotary.

Q. And the other engines? A. Yes, sir.

Q. They were all taken up there to water?

A. Yes, sir.

Q. Did you get any orders that day to call the crew to come back?

A. I was told to call the crews as soon as the engines were ready to go back.

Q. What time did you call them? [247—196]

A. 12:30.

Q. 12:30 you called them to go on duty?

A. Yes, sir.

Q. That was your orders?

A. That was my orders.

Q. Did you wake up the rotary crew?

A. I woke up all the crews.

Q. The entire crew?

A. The rotary crew and the other pusher crew.

(Testimony of Warren Taylor.)

Q. Mr. Reed?

A. Mr. Reed was the first one up.

Q. Mr. Albright? A. Yes.

Q. Holden? A. Holden.

Q. And all the other crew?

A. And all the other crew.

Q. Do you know what Reed, Albright and Holden were doing in a general way from that time up to the time they got out at 4:15?

A. I couldn't tell just what they were doing. Reed came on the engine a few minutes after I called him and he lifted up some of those trap-doors in the pilot-house and looked around there awhile and said he had a lot of work to do, and he went and got some monkey-wrenches, tools and stuff to work with and the crew was there, and I went back to the caboose and stayed there awhile.

Q. Do you know whether or not he was at work generally up to the time the train left?

A. Yes, he was at work there. [248—197]

Q. Was Mr. Albright helping him?

A. I don't know whether Albright was helping him or not. I think Holden was up helping him, though.

Q. Now, do you recall the accident at which Reed lost his life as you came back to the bridge—do you recall the accident itself?

A. No, I do not. I was asleep at the time.

Q. You were asleep at the time the rotary went over? A. Yes, sir.

Q. Did you wake up?

(Testimony of Warren Taylor.)

A. It kinder woke me up but I was so used to the jar, the jar of the rotary, that I went back to sleep again right away.

Q. Did you wake up at all while you were there?

A. Terry came back and called me a few minutes later.

Q. Where did you go then?

A. I went up to the rotary.

Q. What did you do when you got there?

A. I looked around there a few minutes and Wilson and Scott were putting 23 back on the track and I helped them.

Q. What was 23? A. The head pusher.

Q. How much of that was off the track?

A. The pony trucks were off the track.

Q. What do you mean by that?

A. The two front trucks, small trucks.

Q. The two front trucks of the locomotive—that was all that was off?

A. That was all I could see off there.

Q. And they were up on the bank, at the end of the bridge?

A. Yes, they were on the ties. [249—198]

Q. Did you assist in getting Albright out?

A. No, sir; they had him out and in the coach when I got there.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. You say that you took the section-men from the bridge up to Teikhell?

(Testimony of Warren Taylor.)

A. I did not—we took them from 78.

Q. Did you take them from 78 down to the place where you got your water?

A. We did not go from 78 to where we got water. We went from Mile 77.

Q. Then the first you saw of the section-men was when you reached Mile 78, after you had watered up your rotary at Mile 75A?

A. No, sir; we saw them at 77, where we ran into the drift—went out of water.

Q. At Mile 77?

A. Yes, sir; that is the first place I saw them.

Q. You had watered up the rotary then?

A. No, sir.

Q. Did you take them along down there with you to the bridge? A. Yes, sir.

Q. What were they doing at 77 when you saw them? A. I couldn't tell you.

Q. Were they doing anything when you saw them?

A. I just saw them walk over there; that is all.

Q. They walked over to the train? A. Yes.

Q. And then went with you down to bridge 75A?
[250—199] A. Yes, sir.

Q. They helped you to water up there?

A. I didn't see them watering up. I think they unloaded some coal back there.

Q. They went down and unloaded this coal that was on the local? A. Yes, sir.

Q. And went on with you then, when you left there, up to Teikhell, did they? A. Yes, sir.

Q. Do you know why they went to Teikhell?

(Testimony of Warren Taylor.)

A. Well, the coal was frozen. It was a very cold job getting them out and they were in a hurry, and they took the men from there up there to load up the coal on the rotary, to load up the coal on the rotary and the two pushers.

Q. That is part of the work of the section-men?

A. Yes, sir.

Q. You say they were in a hurry?

A. They seemed to be, the way I got my orders up there.

Q. What time did you take charge of the engines at Teikhell? A. A little after 8 in the morning.

Q. They had been up and watered and came back, had they? A. Yes, sir.

Q. Where were you sleeping? A. When?

Q. That morning? A. I wasn't sleeping.

Q. Were you awake? A. Yes, sir.

Q. When you got to Teikhell?

A. Yes, sir. [251—200]

Q. Were you awake the night you watered up your rotary at Bridge 75A? A. Yes, sir.

Q. What were you doing?

A. I went up to help them connect up the siphon, to siphon the water out of 23. I was awake about an hour before that, before we got to the bridge and I went up to help them take water.

Q. What work did you do up there?

A. I didn't do any because the siphon was frozen up and there was nothing to do.

Q. You went up and found it was frozen up? Then what did you do?

(Testimony of Warren Taylor.)

A. Backed down to 75A Bridge.

Q. I am speaking about the Bridge 75A—when you reached the bridge at 75A.

A. Going up?

Q. Coming back, that is, when you came back to take water. A. I was on the second pusher.

Q. Did you ride down from the point where you had stopped on the bridge to the second pusher?

A. Yes, sir.

Q. When you got down there what did you do?

A. I sat up on the seat box.

Q. Did you stay there all the time that you were taking water there?

A. Well, I was not on the seat box all the time. I got off the seat box once in a while.

Q. Were you on the rotary at any time?

A. Not at the bridge. [251½—201]

Q. Not at the bridge? A. No, sir.

Q. Were you on either of the other engines there?

A. No, sir.

Q. You didn't have anything to do at that point?

A. No, sir.

Q. You didn't do anything at all then?

A. I was on 21, keeping her alive and helping out.

Q. Whose engine was that?

A. That was Dan Barrett's; he was running it.

Q. Who was fireman? A. Charley Kitsman.

Q. Why didn't you help keep the other engines alive? A. There was a crew on it.

Q. Wasn't there a crew on this one?

A. There was.

(Testimony of Warren Taylor.)

Q. This engine was off the track, was it?

A. Part of it.

Q. What part of it was off?

A. The tank was off.

Q. Any other part of it off?

A. The back drivers might have been off but I am not sure.

Q. You don't know?

A. No,—part of the engine was on the bridge, though.

Q. Were you off the engine?

A. At no time there.

Q. You rode back in that engine?

A. Yes, sir.

Q. And you stayed on that engine?

A. Yes, sir.

Q. All the time that she was there?

A. All the time they were siphoning water.

[252—202]

Q. What was the fireman doing?

A. I couldn't tell you.

Q. What was the engineer doing?

A. He was sitting on the seat box.

Q. Sleeping? A. No, sir.

Q. You don't know where the fireman was?

A. I don't know. He might have been on the engine there at the time, too. I don't remember.

Q. Were you on there an hour and a half?

A. Something like that.

Q. And don't know whether the fireman was on there or not?

(Testimony of Warren Taylor.)

A. He might have been on there some of the time.

Q. Did you see them taking water?

A. I see them thawing a hole through the ice.

Q. Who did you see do that? A. Mr. Scott.

Q. Who else? A. I don't know who else.

Q. Did you see anyone else there?

A. I saw several around there but I don't know who they were.

Q. Did you see Albright? A. No, sir.

Q. Did you see Reed? A. No, sir.

Q. Did you talk with Albright or Reed while you were there? A. Not at the bridge; no, sir.

Q. (By Juror MANTHEY.) It is not the watchman's duty, as long as the crew is on duty, to keep the engines alive, is it?

A. No, it is not; it is just a case of doing a favor.

Witness excused. [253—203]

[Testimony of Herman Albright, for Plaintiff.]

HERMAN ALBRIGHT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Herman Albright.

Q. Where do you reside? A. Cordova.

Q. How long have you lived here?

A. About three years.

Q. What is your occupation? A. Fireman.

Q. Whom for?

A. For the Copper River & Northwestern Railway Co.

(Testimony of Herman Albright.)

Q. How long have you been in the employ of the Copper River & Northwestern Railway Co.?

A. About three years.

Q. You were in the employ then of the Copper River & Northwestern Railway Co. in the months of December, 1911, and January, 1912? A. Yes, sir.

Q. State to the jury whether you were on the train that left here about 11:45 on the 30th day of December, 1911. A. I was.

Q. What part of it were you on and what were you doing? A. I was firing the rotary.

Q. What rotary did you leave on?

A. On the X1 or X2.

Q. The big or little rotary? A. The big rotary.

Mr. COBB.—Is that X1 or X2?

Mr. BORYER.—X2. [254—204]

Q. Then you left on X2 or X1—which was it?

A. X2.

Q. The big rotary? A. Yes.

Q. I will ask you if anything happened to that rotary. A. Yes, sir.

Q. How far had you gotten with it?

A. About Mile 51 or 52, I should say.

Q. Do you know what it was that happened?

A. We blew out a cylinder-head.

Q. Then what did you do?

A. We came back to 49.

Q. Was any other rotary sent out for you?

A. Yes, sir.

Q. About what time did that get there?

A. I don't remember.

(Testimony of Herman Albright.)

Q. One did come to take the place of the one you started with? A. Yes, sir.

Q. What rotary was that? A. That was the X1.

Q. Now, who brought that rotary out, X1, if you remember? A. I don't remember.

Q. What became of the crew that came out on it?

A. They took this rotary that had broken back into Cordova.

Q. Tell the jury whether or not the same crew that left here at 11:45 on the 30th of December on X2 took rotary #X1. A. They did.

Q. They just changed crews?

A. They took the X1.

Q. The same crew that left here at 11:45 on X2?

A. Yes, sir. [255—205]

Q. Who composed that crew?

A. The rotary crew?

Q. Yes, the rotary crew.

A. Mr. Reed was the engineer, Kenneth Holden was pilot and I myself was firing.

Q. Now, do you recall what time you got back to 52? A. I don't recall.

Q. Do you recall what time you got to Miles Glacier. A. I don't remember.

Q. Do you remember what time you got to Bridge 75A, as it is called?

A. That was in the evening; yes, sir.

Q. Somewhere along about 9 o'clock—the evening of what day? A. The 31st of December.

Q. State, now, to the jury whether or not you and the crew had then been continuously at work, con-

(Testimony of Herman Albright.)

tinuously on duty, since you left here on the 30th.

A. State that again.

Q. Tell the jury whether or not when you reached this Bridge 75A you and the rest of the rotary crew had been continuously at work since you left Cordova the day before. A. Yes, sir.

Q. Had you or had you not? A. I had.

Q. Did you pass the bridge as you went up before you stopped at all there? A. Yes, sir.

Q. About how far beyond did you go?

A. Well, I don't know, but I should judge probably half a mile or three-quarters.

Q. Then what did you do—did you stop? [256—206] A. We stopped; yes, sir.

Q. Do you know why you stopped?

A. Well, we ran out of water and coal.

Q. State what efforts, if any, were made to get water there.

A. I don't remember just what efforts were made.

Q. You don't recall that? A. No, sir.

Q. What was your condition physically at that time with reference to being fresh or rested or otherwise? A. Well, I was very tired.

Q. Hungry? A. And hungry.

Q. Had you had anything to eat before that?

A. Yes.

Q. When had you had something to eat?

A. We stopped some time on the way up from 55.

Q. You don't recall the time? A. I do not.

Q. When you couldn't get water and your water

(Testimony of Herman Albright.)

ran out after you passed this bridge, what is the next thing you did?

A. I don't know just what they did.

Q. Do you remember backing back?

A. Yes, sir.

Q. Where to? A. To Bridge 75A.

Q. Do you know what they backed back for?

A. For water.

Q. Do you know whether they got water there or not? A. Yes, sir.

Q. About how long were they on the bridge while they were getting water?

A. I don't remember. [257—207]

Q. It takes some time to water an engine, siphoning it out of a creek? A. Probably an hour or so.

Q. What are the duties of a fireman in a general way, tell the jury.

A. His duties are to keep up sufficient steam and to keep water in the boiler.

Q. Anything else—does he pay any attention to the fires? A. Yes, sir.

Q. Does he pay any attention to the ashes?

A. Yes, sir.

Q. What does he do with reference to the fires and ashes—what are his duties regarding them?

A. He takes care of them.

Q. How does he take care of the ashes?

A. He sees that they are in their proper place.

Q. Now, I want you to tell the jury what kind of an ash-pan there was on that rotary.

(Testimony of Herman Albright.)

A. It was a hoe-pan—it hoed to one side, to the right side.

Q. Now, I want you to explain to them, so they will understand it as you do, how you have to clean that sort of a pan—what you do to get the ashes out of it.

A. Well, the pan is located underneath the grates, underneath the rotary. It is down pretty low and you have to get down pretty low to clean it; you clean it with a hoe—draw them out to one side.

Q. About where do they fall when they are pulled out with reference to the track?

A. Just about on top of the rail.

Q. The right-hand rail, the way the engine is headed, is it? [258—208] A. Yes, sir.

Q. Now, could you clean the ashes out of that sort of a pan anywhere except on a bridge or station on that trip? A. Yes, there were places—55.

Q. 55? A. Yes, sir.

Q. What was there there?

A. Well, the snow was cleaned off there so a person could get at the pan.

Q. That had been cleaned off? A. Yes, sir.

Q. For that purpose? A. Yes, sir.

Q. Among others? A. How is that?

Q. Cleaned off for that purpose?

A. Yes, as far as I know.

Q. Did you clean your pan there?

A. Yes, sir.

Q. Now, where the snow had not been cleaned off or you were not on a bridge, could you clean it?

(Testimony of Herman Albright.)

A. Well, not very well.

Q. Why?

A. Because of the frozen snow and ice.

Q. You mean banks on either side of the track?

A. Yes, the snow and frozen snow.

Q. I want you to describe them to the jury and how close it is to the rotary as the rotary plows through.

A. Well, it is almost up against the cab this bank, the cab of the rotary.

Q. When you got to this bridge, went back there and took water [259—209] did you clean your pan? A. Yes, sir.

Q. While they were taking water?

A. Yes, sir.

Q. Threw the ashes out—which side?

A. The right side.

Q. Were you careful at that time to see that there was no fire left in them? A. Yes, sir.

Q. How long had you been there before you cleaned out those ashes? A. I don't recall.

Q. Did you get orders from anyone?

A. No, sir.

Q. Did your engineer order you to do it?

A. No, sir.

Q. Did he see you doing it when you started in?

A. No, sir.

Q. Do you know whether he was aware of it before the train left? A. Yes.

Q. Did he say anything to you about it?

A. Yes.

(Testimony of Herman Albright.)

Q. What did he say?

A. He said, "Are you sure that the ashes are all off the bridge?"

Q. What did you tell him?

A. I told him they were.

Q. That was all that was said about it?

A. Yes, sir.

Q. About what time was that with reference to the time you left? [260—210]

A. I don't know exactly.

Q. I will ask you if you were sure that those ashes were out—what did you do to them?

A. Well, I shoved them off with the hoe.

Q. Off the track? A. Off the ties.

Q. Now, after that you backed back and got coal, did you, or do you recall that?

A. I don't know just when, or about getting coal.

Q. Do you recall when you got to Teikhell?

A. I don't know just what time it was.

Q. You got there at 5:45 in the morning. Did you go to sleep as soon as you got in there?

A. Yes, sir.

Q. Do you remember what time you were called to go back? A. It was somewhere around noon.

Q. You went back to your duties at that time?

A. Yes, sir.

Q. Do you remember when you reached this bridge again? A. Yes.

Q. What time was it?

A. Some time in the evening—probably 7 o'clock.

Q. Did anything happen then? A. Yes, sir.

(Testimony of Herman Albright.)

Q. Tell the jury just what it was, as near as you can recall.

A. Well, all I know about it was the rotary had gone off the bridge and fell, that was all.

Q. Which side?

A. I don't know which side. It was dark at the time.

Q. If it went off to the right side as it was headed this way [261—211] that was the opposite side from where your ashes were put over?

A. Yes, sir.

Q. You were caught in the wreck?

A. I was in the wreck; yes, sir.

Q. You didn't know anything when you were taken out? A. No.

Q. You were taken back to Chitina?

A. Yes, sir.

Q. I will ask you if your pan needed hoeing when you got to this bridge? A. It did.

Q. Had there been any opportunity to clean it any time since you left 55 before that?

A. Not that I can recall.

Q. There was no place prepared along the road?

A. No.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Did you stop at 67? A. Yes, sir.

Q. Did you take water at 67? A. Yes, sir.

Q. You stopped there about an hour and a half, did you not?

(Testimony of Herman Albright.)

A. I don't remember how long it was.

Q. You were there some time, were you?

A. Yes, sir.

Q. What is there at 67?

A. There is a siding, a passing track.

Q. Is there a water-tank there?

A. There used to be a tank, and is now. [262—

212]

Q. At that time?

A. But there isn't any water there.

Q. Was there water there at that time?

A. No, sir.

Q. What did you stop there about an hour and a half for?

A. We stopped on the bridge there to siphon the water.

Q. At 67? A. Baird River; yes.

Q. Did you siphon any water there? A. Yes.

Q. And you were there for about an hour and a half? A. As near as I can recall.

Q. Did you have your lunch with you?

A. No, sir.

Q. Had you taken any provisions with you?

A. Not on the rotary.

Q. You had nothing on there to eat?

A. No, sir.

Q. Was there a section-house at 67?

A. Not at that time.

Q. Where was your next section-house?

A. At 78.

Q. Was there a section-house at 55?

(Testimony of Herman Albright.)

A. Yes, sir.

Q. Did you eat at 55? A. Yes, sir.

Q. You didn't take any provisions from 55 then with you? A. Not on the rotary.

Q. Why didn't you take provisions with you?

A. Well, they always run from camp to camp.

Q. Were you expecting to get to the camp sooner?

[263—213] A. Yes.

Q. You expected to make the camp by the next meal-time, did you, the next meal hour?

A. Well, I hadn't any idea. I didn't know how long it would take.

Q. How long had you been running on that rotary?

A. I never run on the rotary.

Q. You were running on the rotary at that time?

A. I was firing the rotary.

Q. How long had you been firing that rotary?

A. About three weeks.

Q. Under whom? A. Mr. Reed.

Q. You had been working for Mr. Reed then for about three weeks? A. Yes, sir.

Q. You had made that trip repeatedly, had you?

A. I had made several trips; yes.

Q. Did you pass any section-house between 55 and Bridge 75A? A. No, sir.

Q. And you say you had been working for Mr. Reed about three weeks? A. Yes, sir.

Q. Was that your first rotary work?

A. Yes, sir.

Q. He was your instructor, was he?

A. Yes, sir.

(Testimony of Herman Albright.)

Q. Instructed you as to the rules, operation, etc., of the rotary? A. Well, yes, as far as I know.

Q. If you wanted to know something you would ask him, would you? A. Yes, sir. [264—214]

Q. He had charge of the rotary, did he?

A. Yes, sir.

Q. Now, where did you clean your fires?

A. Down at a snowbank.

Q. What snowbank?

A. Where we had stopped, about half a mile or three-quarters—

Q. Above Bridge 75A? A. Yes, sir.

Q. Was your pan full then?

A. I suppose it was.

Q. Did you look to see whether it was?

A. I couldn't get at the pan there.

Q. Did you know whether it was?

A. I knew, yes.

Q. You knew it was full, did you? A. Yes.

Q. Then you proceeded down to Bridge 75A? How long did you remain at that snowbank?

A. Well, I can't just recall how long we were there. Probably half an hour or somewheres along there.

Q. You were trying to take water from the other engine for awhile?

A. I don't know what they were doing.

Q. What were you doing?

A. I was cleaning the fire.

Q. Then you started back and down to Bridge 75A? A. Yes, sir.

(Testimony of Herman Albright.)

Q. And when you got to Bridge 75A you told Reed you were going to clean your fire, clean your pan, didn't you? A. Yes.

Q. And then you started to clean your pan, didn't you? [265—215] A. Shortly after; yes.

Q. You got down on the right-hand side—which side did you get on to clean your pan?

A. On the right side.

Q. On the right side headed as your rotary was headed? A. Yes, sir.

Q. Then which way was your rotary headed?

A. The rotary was headed towards Teikhell.

Q. Then that would be on the river side?

A. Yes, sir.

Q. Is that the same side that you were siphoning water from? A. Yes.

Q. Now, just how wide is your rotary as compared with the track?

A. The rotary is about eight feet wide.

Q. How wide is your track?

A. The ties are eight feet.

Q. The ties are eight feet? A. Yes, sir.

Q. Where did you stand when you cleaned your fires? A. When do you have reference to?

Q. When you were hoeing out your pan?

A. I was standing on a cap.

By the COURT.—A cap of the bridge?

A. A cap of the bridge, of the trestle.

Juryman HUNT.—A cap of the bent?

A. Of the bent; yes.

Q. Who gave the orders to have the rotary moved

(Testimony of Herman Albright.)

so that you could stand on that bent?

A. They just stopped so I could get right out on to the cap.

Q. They just happened to stop so you could step right off and [266—216] step on to the cap?

A. Yes, sir.

Q. You stopped your train with a view to stepping out at the side of that cap?

A. I didn't stop the train.

Q. Who did stop your train? A. I don't know.

Q. Who usually stops the train?

A. Well, it is the engineer on the pusher.

Q. Do you know if that was the object, to stop it there so you could step off on to this cap?

A. Not that I know of.

Q. You don't know. Now, then, you hoed your pan out there? A. Yes, sir.

Q. You had cleaned your fires before?

A. Yes, sir.

Q. It had clinkers in it, did it? A. A few, yes.

Q. And you threw those down with your pan?

A. No, sir.

Q. What did you do with them?

A. With the clinkers?

Q. Yes. A. I threw them out.

Q. Where is this you threw them out?

A. Down at that snow bank.

Q. Your ashes were then pulled at the point or place where the rotary derailed on its return trip?

A. Well, now, I can't say it was that place. I don't know.

(Testimony of Herman Albright.)

Q. You pulled your ashes on the north end of the bridge, didn't you? [267—217]

A. I don't remember it was the north end.

Q. Do you know what portion of the bridge it was?

A. All I know it was on top of the bridge.

Q. Do you want the jury to believe that the reason you pulled your pan there was because you were very hungry and tired? A. No, sir.

Q. That was not the reason you pulled your pan there? A. No, sir.

Q. You told Mr. Cobb you were very hungry and tired? A. Yes, sir.

Q. Then that hadn't anything to do with the cleaning of your fires or the putting out of your fires, had it? A. No, sir.

Q. Mr. Lee testified here that he heard a conversation between two persons regarding the cleaning of this fire or this pan on the rotary. Do you know if the conversation that he heard was the talk at the time you told Mr. Reed that you were going to clean your pan?

A. I didn't have a conversation with Mr. Reed.

Q. You told him you were going to clean your pan?

A. Yes, sir.

Q. I ask you if you know whether this conversation is the conversation that Mr. Lee heard, that he has reference to?

A. Well, I said I didn't have a conversation with Mr. Reed.

Q. Did you hear Mr. Lee's testimony?

A. Yes, sir.

(Testimony of Herman Albright.)

Q. Do you recall his testimony about a conversation that he heard from some one on the rotary?

Mr. COBB.—We object to that—he didn't say he heard it on the rotary. He said he heard it somewhere.

By the COURT.—He may answer. [268—218]

A. I don't know.

Q. Do you recall whether you heard that or not?

A. I don't know.

Q. Do you recall if you heard Mr. Lee make that statement? A. I heard it; yes.

(By the COURT.)

Q. How do you remember Mr. Lee's testimony? Repeat it as you remember he gave it in court about that matter.

A. I don't remember his testimony. I remember him saying that he heard a conversation.

Q. About what?

A. About something about cleaning a pan on the rotary.

Q. Which was it—cleaning fires or cleaning a pan?

A. Cleaning a pan.

(Continuation of Examination by Mr. BORYER.)

Q. Now, you state that you told Engineer Reed, who had charge of the rotary, that you were going to clean the pan?

A. I made that remark, yes.

Q. Do you know if that is the conversation that Mr. Lee has reference to? A. I don't know.

Q. You couldn't tell? A. No.

Q. Now, will you tell me again what Mr. Reed

(Testimony of Herman Albright.)

'said to you regarding the cleaning of those ashes, that ash-pan?

A. He didn't hear me, I don't think, because he never answered me.

Q. Do you know if he heard you?

A. I can't say that.

Q. Tell me what he said to you about the cleaning of your pan. [269—219]

A. About the cleaning?

Q. Yes.

A. Well, when I had cleaned it he said to me, "Are you sure that the ashes are all off the bridge"?

Q. What did you tell him?

A. I advised him; yes.

Q. About what is the size of your pan on that rotary?

A. It is about 5 ft. long—about 4 ft. or about 3½ ft. wide and about 12 or 14 inches deep.

Q. About what quantity of ashes would that pan hold? A. Well, I can't tell.

Q. About how many bushels of ashes, would you say? A. I never figured it out.

Q. Have you some kind of an idea as to about what they would hold? A. I have not.

Q. You have no idea whatever? A. No, sir.

Q. Was it full? A. Yes, sir.

Q. And you hoed all of them out of the pan?

A. Yes, sir.

Q. And you say that in hoeing them out of the pan they would fall just about on the track, on the side that you hoed them out?

(Testimony of Herman Albright.)

A. I said they would fall right on the rail.

Q. Was that a solid bridge or not?

A. Solid? What do you mean by a solid bridge?

Q. I mean, is it decked over the top?

A. Well, there is ties; there is stringers,—there is caps and [270—220] there are stringers on the caps and ties on the caps and the rails on the ties.

Q. Do you know about what distance the ties are apart?

A. Well, I should judge about 5 inches.

Q. About five inches apart?

A. Five or six inches.

Q. These stringers rest upon what?

A. On the caps.

Q. What do the caps rest upon?

A. On the piles.

Q. About how high is that bridge from the ice?

A. Probably eight feet, such a matter.

Q. Now, then, if you cleaned your pan, all the ashes out of your pan, and were pulling your ashes over this rail, do you think that the rail and the ties where you pulled it out would catch all of the ashes?

A. They fell, the ashes fell through the bridge.

Q. Through the opening of the ties?

A. Yes, between the ties, through the bridge.

Q. And some of them would lodge on the stringer and on the cap, would they not? A. Yes, sir.

Q. And some would go on down along the piling, would they not? A. Yes, sir.

Q. Where was Mr. Reed when he said this to you?

(Testimony of Herman Albright.)

A. He was standing in the pilot-house, right at the door.

Q. Where were you standing?

A. I was standing on a cap.

Q. He was looking at you, was he?

A. Yes, sir.

Q. Could see you and could see what you were doing? [271—221] A. Yes, sir.

Q. You still had your hoe in your hand, did you?

A. Yes, sir.

Q. After this conversation how did you get on to your engine, on your rotary?

A. I went up through the pilot-house door.

Q. You stepped up off this cap?

A. I crawled up along the side on the bridge to the pilot-house door.

Q. You crawled along the side—backwards or forwards? A. Forwards.

Q. Crawled on up then towards the head of the engine? A. Yes, sir.

Q. On the ties that protrude out over the track?

A. Yes, sir.

Q. When you got up in the pilot-house, how long was it before you left there?

A. I don't remember.

Q. About how long? A. I couldn't recall.

Q. What did you do when you got up there?

A. In the pilot-house?

Q. Yes.

A. I went back in where the tank was.

Q. What did you do there? A. Put in the fire.

(Testimony of Herman Albright.)

Q. Did you stay in there then until you left?

A. Yes, sir.

Q. Didn't go out again? A. No, sir.

Q. Are you certain of that? [272—222]

A. Yes, sir.

Q. Did Reed get off of the engine?

A. Not that I know of.

Q. Do you know if he was down on the cap?

A. I never seen him there.

Q. Then did you use the hose while you were there? A. We had no hose.

Q. Just before you got on the rotary, do I understand you took what ashes was on the track and was on the ties and pushed it off? A. Yes, sir.

Q. Which way did you push them?

A. Just so they would fall off from the ties, so they would drop down on to the ice and snow.

Q. What is the width between the rails?

A. I never measured it.

Q. About what? A. About 7 feet—I mean 6 ft.

Q. Between the rails? A. About that.

Q. I mean between the ties?

A. About that; yes, sir.

Q. I said between the ties—I mean between the rails. A. The space in between the—

Q. Rails, where the wheels of your rotary run on?

A. That is probably 5 ft.

Q. Not quite 5 ft., is it? About 4—8½, is it not?

A. I don't know. I am just judging it is about 5 ft.

Q. Where did you stand when you pushed these

(Testimony of Herman Albright.)

ashes off of the ties?

A. I was standing on the cap and on the bridge.
[273—223]

Q. Did they fall—some fall on the side of the rail and some fall on the outside of the rail, or would they fall on the inside of the rail?

A. Fall on both sides of the rail.

Q. Then the ashes that were on the inside of the rail you would take your hoe and push over toward the other rail, would you?

A. I pushed them to one side, so they would fall in between the ties on to the snow and ice.

Q. And fall down below? A. Yes, sir.

Q. Did you throw any water on your ashes?

A. No, sir.

Q. Just left them there as you pushed them off?

A. Yes, sir.

Q. Now, then, I will ask you if you did not state that the reason that you cleaned your pan there was in order to save time?

Mr. COBB.—We object to that until he states the time and place and persons to whom he stated it.

Objection sustained.

Q. I will ask you if you did not, in the month of February, 1912, tell me and make oath to the fact that the reason you cleaned your pan there was in order to save time?

A. That was one of the reasons.

Q. I will ask you if when you were called by Mr. Geiger, when he was investigating this matter in February, if you did not tell Mr. Geiger that that was

(Testimony of Herman Albright.)

the reason that you had cleaned your pan there?

A. That was one of the reasons.

Q. In order to save time? [274—224]

A. Yes, sir.

Q. Now, you say Mr. Reed said to you—what did you say Reed said to you regarding that?

A. I said that he had said, “Are you sure that you have cleaned all the ashes off of the bridge?”

Q. He didn’t ask you whether you had been careful to see that the ashes did not lodge down on the stringers and at the bottom of the piling?

A. No, this was the only conversation that I had with Mr. Reed regarding the pan.

Q. He didn’t get out to see if you had done it?

A. Not that I know of.

Q. Do you know why he asked you if you were certain that you had cleaned it off the bridge?

A. Well, I suppose to make it safe.

Q. Is it dangerous to clean a pan on a bridge?

A. Yes, sir.

Q. You say that Holden was pilot?

A. Yes, sir.

Q. Mr. Reed had charge of the engine?

A. Yes, sir.

Q. And control over the engine, the rotary?

A. Yes, sir.

Q. Now, I will ask you—you were there at the time these fires were cleaned there? A. What fires?

Q. When you cleaned your pans there at 75A?

A. I said I didn’t clean any fires.

Q. Well, you were there after the bridge had

(Testimony of Herman Albright.)

burned and the rotary fallen through, were you?

A. Yes, sir. [275—225]

Q. When were you next there?

A. Well, it was the time I came from the hospital, from Chitina to Cordova.

Q. You went from bridge 75A the night of the accident and you were taken to Chitina, were you?

A. Yes, sir.

Q. And how long did you remain in Chitina?

A. About 21 days.

Q. And then you came down to this bridge, did you? A. Came by it; yes.

Q. Now, I will ask you if you did not tell Mr. Geiger at the time of this investigation that that was the reason that that bridge had burned?

Mr. COBB.—We object to that. He should give the time and place and those present.

Objection sustained.

Q. I will ask you if you had a conversation with Mr. Geiger, who was then superintendent of the railroad, during the month of February or January, regarding this accident at Bridge 75A?

Mr. COBB.—Where was the conversation.

Mr. BORYER.—In Mr. Geiger's office.

A. I don't recall.

Q. Don't you recall having a conversation with Mr. Greiger concerning the investigation of this matter? A. Oh, yes, I recall that.

Q. I will ask you if you did not tell Mr. Geiger that in your opinion that accident was caused by reason of the fact that you had cleaned your pan

(Testimony of Herman Albright.)

there that night? A. Well, I didn't know.

Q. Didn't you tell him that. [276—226]

Mr. COBB.—I shall object to that as not contradictory to anything he has testified to here, and his opinion at that time or now would not be of any particular weight.

By the COURT.—I have no objection to it going to the jury for what it is worth.

Mr. COBB.—I haven't either, if the Court thinks it is worth anything.

By the COURT.—He may answer.

Last question read by reporter as follows:

Q. Didn't you tell him that?

A. I think I did.

Q. I will ask you if you did not also tell him at that same time—I don't see any other way it could have started, this bridge being covered with snow and ice there was no other way for it to start except by this fire?

Mr. COBB.—We object. If he has his sworn statement that this witness has signed, it ought to be shown to him and he ought to be allowed to read it.

By the COURT.—He may have the benefit of reading it if he wishes to, if he doesn't remember the question.

Mr. COBB.—Mr. Boryer is manifestly reading from his statement in writing, and if the statement is in writing, I insist that the witness be first shown the statement that he has made in writing.

By the COURT.—If the witness doesn't remember

(Testimony of Herman Albright.)

the question, he may refer to it. Do you recall the question? A. I think I did.

By the COURT.—Can you answer it?

A. I said I think I did.

By the COURT.—You think you did say so?

A. Yes, sir. [277—227]

Q. Now, then, is it not a fact that the reason that you did not use any water to put this fire out is because you thought that the fire and ashes were all off of the ties? A. Yes, sir.

Q. And you did not look to see if it was above or had fallen down along the piling—you couldn't see down there, could you, standing on the caps?

A. I could see; yes.

Q. How would you be able to see on the other side of the piling if you were standing out on a cap?

A. By moving to one side and then to the other.

Mr. BORYER.—That is all.

(By Mr. COBB.)

Q. How long were you in the hospital?

A. About 21 days.

Q. And you were brought down here some time in January? A. Yes, sir.

Q. Do you remember what date?

A. I don't remember what date.

Q. How soon after this was it before they had you up there at Geiger's office taking this statement? A. It wasn't long after that.

Q. At that time you hadn't been back up the road?

A. No, sir.

Q. You didn't know that only one side of the

(Testimony of Herman Albright.)

bridge was burned at that time, did you?

A. I did not; no.

Q. You didn't know it was the side opposite from where you pulled your ashes at that time that was burned? A. No, sir, I didn't know. [278—228]

Q. I understand you to say they had no hose on that rotary? A. That is what I said.

(By Mr. BORYER.)

Q. Were they siphoning water at the time?

A. What time?

Q. When you finished cleaning your pan?

A. I think they were; yes.

Q. They were still siphoning water?

A. Yes, sir.

Q. And how far was this water from this cap?

A. The water? I can't tell—you mean how far down from the cap?

Q. No, how far from the hole?

A. Probably, say, 20 or 30 ft.—say, about 30 ft.

Q. The creek was all frozen over except at the place where they were siphoning this water?

A. It was frozen over; yes.

Q. Except at that place?

A. They made a place, as I understood.

Q. They made a place to get this water out?

A. Yes, sir.

Q. You could walk around on the ice under the bridge, could you? A. I didn't walk around.

Q. It was covered with snow, was it?

A. Yes, sir.

Q. And the creek was all frozen over?

(Testimony of Herman Albright.)

A. Yes, sir.

Q. About how deep was the ice?

A. I don't know.

Q. Have you any idea?

A. I have not. [279—229]

Q. The men were walking around on the ice, were they? A. Well, I don't know.

Q. Did you see any men down there siphoning water? A. Yes, I saw them.

Q. Did you see any other men around?

A. They were the only men I saw.

Q. They were walking around down on the snow and the ice? A. Yes, sir.

Mr. BORYER.—That is all.

Witness excused. [280—230]

[Testimony of Frank R. Townsend, for Plaintiff.]

FRANK R. TOWNSEND, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name?

A. Frank R. Townsend.

Q. Where do you reside now? A. Cordova.

Q. What is your occupation?

A. Locomotive engineer.

Q. Were you ever in the employ of the Copper River & Northwestern Railway Company?

A. I am—I have been.

Q. At the present time are you? A. I am.

Q. How long have you been in their employ?

A. Including the Katalla Company, which is the

(Testimony of Frank R. Townsend.)

same company, I think, since June, 1907.

Q. You were in the employ, then, of the Copper River & Northwestern Railway Co. in December, 1911, and January, 1912? A. Yes, sir.

Q. Now, do you recall the trip going up the road, leaving here on the 30th of December, 1911?

A. I do.

Q. Did you go on that trip? A. Yes, sir.

Q. In what capacity?

A. As engineer on Engine #102, pulling the local.

Q. Do you recall what time you got out of here?

A. I do not.

Q. Can you now state what time you got out?

A. I cannot, except by hearing from the train-sheet. [281—231]

Q. That train got out of here, I believe, at 11:45, according to the train-sheets, and your train left at one P. M.—do you recall where you broke the rotary?

A. I do not.

Q. You did break it somewhere? A. Yes, sir.

Q. Was it before you reached Mile 52?

A. Yes—I couldn't say exactly. I know we were behind them and caught up with them at 51—that is where they commenced to pound the snow, I think.

Q. Was there anything that delayed the train there? A. The rotary broke down there.

Q. What was done then? A. I couldn't say.

Q. Do you know whether another rotary came out or not? A. Not there.

Q. Where did one come out?

A. We changed rotaries at Miles Glacier.

(Testimony of Frank R. Townsend.)

Q. That was after you backed down to Miles Glacier another came out?

A. We backed to 39, I think.

Q. When the other rotary came out—do you remember when you got to Bridge 75A?

A. I remember when they stopped north of 75A on account of the rotary running out of water.

Q. Tell the jury all you remember about that—stopping and the getting of the water and coaling up, etc.

A. I don't know very much about it, only I was on the local following the rotary and I got a signal to back up our train so as to give the rotary crew a chance to get back [282—232] on the bridge to get some water—they didn't have enough water to run to the water-tank, about two miles away. I backed clear of Bridge 75A and that gave the rotary a chance to take some water there, and while we were stopped there we threw some coal off of our train to be used on the rotary.

Q. Did the rotary back up and get this coal?

A. They did.

Q. Then did they pull out? A. They did.

Q. How far ahead of your train, the local of which you were engineer, was the rotary when you crossed this bridge? A. Going north the first time?

Q. No, the second time—how much ahead did it go?

A. Very little. We followed them very close through that section usually.

Q. Why?

A. Well, in case of storms the track would drift

(Testimony of Frank R. Townsend.)

over again, so we had to keep very close to them.

Q. Crossing this bridge the second time, I suppose you didn't notice any signs of fire on it?

A. No, sir.

Q. How long have you been a locomotive engineer?

A. I was promoted in 1895.

Q. I will ask you, from your experience as an engineer on railroads, if it is a very common or uncommon thing for bridges to be fired by engines passing over them?

Mr. BORYER.—We object to that question as incompetent, irrelevant and immaterial, and not pertinent to the issues in this case. [283—233]

Objection overruled. Defendant allowed an exception.

A. There was a time when they were all wooden bridges; it wasn't uncommon at all.

Q. Do you know what time it was that you got to Teikhell on the way up?

A. I don't remember the time.

Q. The train-sheet shows it to be 5:45 in the morning and you started back from there that afternoon. Did you return, leaving there on January first, from Teikhell? A. Yes, sir.

Q. You were still on the local? A. Yes, sir.

Q. How far behind the rotary were you when it reached this bridge, 75A, on the return?

A. The time we reached 75A on the return I was coupled into their caboose.

Q. All coupled in together? A. Yes, sir.

Q. Did you see the rotary go over? A. No, sir.

(Testimony of Frank R. Townsend.)

Q. What was the first thing that called your attention to it? A. The sudden stop.

Q. What did you do then?

A. Opened the window and jumped out in the snow and I could see the rotary lying there.

Q. Did you go to it? A. Yes, sir.

Q. Go ahead and describe to the jury what you saw there or did as near as you can recall it.

A. Well, the rotary was lying on its right side, the front of [284—234] the rotary, known as the hood, being lowest, the tank lying on the embankment or the edge of the bridge. And the first person I saw was Mr. Wilson. He was in between the rotary and the tank working at Albright, who was buried—he was the fireman. He was buried up in the coal and I tried to assist him some, but there wasn't room for two of us to work there, and I asked him if he had seen anything of the rest of the boys and he said, "No," he was busy, had all he could do there—something to that effect. I stepped back and they were coming out with Holden about that time. They got him out of the pilot-house and I helped take him back to the coach. Then I returned to the rotary and they were still working on Albright and had the covers off the tank and were removing the coal out of the tank to get at him. I again inquired if they had seen anything of Reed—there didn't seem to be anybody that seen or heard anything of him—but we commenced looking for him then and I think Mr. Scott was the first one to get an ax—either him or the roadmaster. He

(Testimony of Frank R. Townsend.)

chopped a hole through the roof of the rotary—lying on the side we couldn't get to the position where he would be standing, only by going through the roof. We chopped a hole in there and there was quite a little difficulty in doing that on account of the iron brads in there and one thing and another, and they felt around until they got hold of his hand—supposed to be.

Q. There couldn't be anybody else in there except him?

A. At the time we were there, the watchman—nobody had seen him up to that time.

Q. He turned up later?

A. Yes, sir. [285—235]

Q. About how long were you there at this place?

A. I couldn't say. Possibly an hour. The pony truck leading the engine pushing the rotary was off the track, and I know we held a sort of consultation there among the engineers and conductors in regard to devising some means of getting Reed's body out from under there, but we could see no possible way of getting him out—that was the first thing considered.

Q. And you didn't get him out at that time?

A. No, sir.

Q. Do you know how long it was before they got him out?

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled.

Q. When were you back there the next time?

(Testimony of Frank R. Townsend.)

A. I couldn't give the date—after the road was opened up there. About the first train out of Chittina coming south.

Q. When you went around there to the front **this** time did you notice how much of the bridge was burned? A. No, sir, I did not.

Q. Or which side of it was burned?

A. I did not.

Q. In your experience as a locomotive engineer, does the engineer have control of all the movements of his fireman with reference to cleaning his ash pans, pulling his fires, etc.? A. No, sir.

Q. Do you know anything about a rotary engine, running a rotary snowplow? A. Yes, sir.

Q. Have you ever been in one? [286—236]

A. Yes, sir.

Q. Have you worked with it? A. Yes, sir.

Q. What chance for control over the movements of a fireman has the engineer in one of those things?

A. In regard to the way he fires it?

Q. Yes.

A. He can't attend to his fire at all. He can't watch him—don't see him for hours at a time, frequently. He might step in behind him to put on an injector but he wouldn't see him.

Q. How about with reference to cleaning his pans?

A. I never paid much attention to the fireman, about cleaning their pans.

Q. That is their business?

A. If I have an experienced fireman.

Q. I hand you Plaintiff's Exhibit "C" and ask

(Testimony of Frank R. Townsend.)

you to explain to the jury from that cut, illustrate to them, where the—first, who compose the crew of a rotary when it is at work?

A. Usually it consists of a pilot, an engineer and a fireman.

Q. Where does the pilot stay?

A. He stays in the front part of the rotary.

Q. Where does the engineer stay?

A. Along the side of the boiler where he has a throttle and a reverse lever there, about midway between the pilot-house and the rear end of the boiler—probably about halfway out of this door in here (indicating).

Q. How does he communicate with the pilot?

A. It is not necessary for him to communicate with the pilot, that I know of. [287—237]

Q. Can he communicate with him without going forward to the pilot-house? A. No, sir.

Q. Can the engineer see forward at all?

A. See the track?

Q. Yes. A. No, he can't see the track.

Q. Where does the fireman stay?

A. He stays to the rear of what is known as the rotary, rear of the boiler—at this edge of the tank. Probably he would stand on the tank.

Q. I want you to explain the interior of that rotary—where the fireman stays and the engineer stays and the other man stays—what sort of compartments they are, so the jury will have an idea what the inside of that thing looks like.

A. There is a large boiler occupies most of this

(Testimony of Frank R. Townsend.)

space in here, the same as a locomotive boiler, which is housed there to keep the snow off of it, and the engines that operate the wheel are situated about the front end of the boiler, two cylinders, and it just leaves a little narrow passage between the outside of the rotary cab and the boiler, in there, and there is a platform on there so you can walk back and forth—you can come from the pilot-house back to the rear where the fireman is—back and forth through there.

Q. That is where the engineer stays, alongside there? A. Yes, sir.

Q. And the fireman stays back of the cab where he can fire the engine? A. Yes, sir. [288—238]

Q. Did you know J. E. Reed in his lifetime?

A. Yes, sir.

Q. How long did you know him?

A. I should judge about three years.

Q. Did you work with him? A. Yes, sir.

Q. Were you well acquainted with him?

A. Yes, sir.

Q. What sort of a man was John E. Reed?

A. As an engine-man?

Q. Both as an engine-man and as a man?

A. I considered him a first-class engine-man.

Q. What was his character as a man, in the community?

A. Sober, industrious, hard-working—a man that was well liked.

Q. A young man? Do you know his age?

A. I do not.

(Testimony of Frank R. Townsend.)

Q. About what would you judge his age to be?

A. I think he was about thirty years old.

Q. Good health? A. Yes, sir.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Are you working at the present time?

A. I have a leave of absence.

Q. You say that Reed was a competent, qualified engineer? A. Yes, sir.

Q. And attended to his duties? A. Thoroughly.

Q. Complied with all the requirements of the company? [289—239]

A. I couldn't say as to that.

Q. To the best of your knowledge? A. Yes, sir.

Q. A man who followed instructions?

A. Yes, sir.

Q. And kept himself posted as to instructions?

A. Yes, sir.

Q. And as to time tables, bulletins, etc.?

A. Yes, sir.

Q. Did you ever work on any road besides this road? A. Yes, sir.

Q. What road?

A. I worked on several; I worked on the Union Pacific.

Q. How long? A. Two years and nine months.

Q. Any other road?

A. I worked on the Burlington.

Q. How long? A. About one year.

(Testimony of Frank R. Townsend.)

Q. Any other road?

A. O. R. & N., three or four months, I guess. From there I went to the Great Northern and worked on that. I couldn't say exactly how long—six or seven years.

Q. I will ask you if you recall Rule 497A, which provides that engineers will be held responsible for the fireman's conduct and must report any inefficiency or neglect to the master mechanic.

A. What road is that on?

Q. The Great Northern.

A. I do not—what is the date? [290—240]

Q. It is Rule Book #3444—I couldn't tell you the date.

A. I don't recall it. It might have been in effect when I was there.

Q. You keep yourself posted as to rules?

A. Not on foreign roads.

Q. While you were on that road? A. Yes, sir.

Q. Was that rule book in effect at the time you worked on that road? (Handing witness book.)

A. I couldn't say. I wasn't working there at that time. I left there in 1897 I think it was.

Q. Who is responsible for the engine?

A. Well, I couldn't say who is responsible for it.

Q. When you take an engine out of here, don't you know who is responsible for that engine?

A. I know I am not.

Q. Who is?

A. I couldn't say who is responsible for it.

Q. Who is responsible for the operation of that

(Testimony of Frank R. Townsend.)

engine? A. The engine is in my charge.

Q. It is placed in your charge? A. Yes, sir.

Q. What do you mean by saying you are not responsible for the engine?

A. If I was responsible for it, as I take the meaning of it, I would be liable for any damage to it.

Q. Aren't you? A. No, sir.

Q. When you take an engine out of here aren't you required to know the condition of that engine?

[291—241] A. Yes, sir.

Q. And when you bring it back aren't you required to report the condition of that engine? A. Yes, sir.

Q. If you break a wheel on that engine, aren't you responsible for it?

A. I hardly think so—I don't think I am.

Q. And you are not responsible for the manner in which you run that engine? A. Yes, sir.

Q. You have charge of running the engine, do you?

A. Yes, sir.

Mr. BORYER.—That is all.

(By Juror PEDERSEN.)

Q. I wish you would please explain to the jury what are the specific duties of the engineer of the snowplow.

A. Well, he has charge really of the snow-plow. He has to take signals, you might say instructions, from the pilot. The pilot has got to be the eyes for the engineer—he can't see. He is back there where he is all by himself. As someone expressed it here in the trial, he is a good deal like an engineer on a vessel, and the pilot has to be in front there—he

(Testimony of Frank R. Townsend.)

has to look out to give the signals to the engineer how to run the wheels.

Q. Then, do I understand that the engineer's duties on the snowplow consist of the care and operation of the machinery that operates the wheel that throws the snow? A. Yes, sir.

Q. His duties are limited to that? A. Yes, sir.
[291½—242]

(By Mr. BORYER.)

Q. As to speed, etc.?

A. That is a good deal from the pilot. He gets signals from the pilot as to how fast to run the wheel, that is, because of the condition of the snow in front. If it is a light snow in front he will call for more steam. If there is heavy snow in front he would signal the engineer of the rotary to turn the wheel faster so the wheel wouldn't become stalled when entering this heavy snow.

Q. What is the duty of the pilot?

A. He has to watch out and convey the signals to the engineer, also to the engines, the locomotives pushing the rotary—they are a good deal the same as—

Q. He is a sentinel? A. Yes, sir.

(By Mr. COBB.)

Q. When you left here on the 30th day of December, 1911, had you been up the road at any time that month prior to that date? A. Yes, sir.

Q. How many times as you recall?

A. I couldn't recall the number of trips. I know we had one trip, just the trip previous to that—I

(Testimony of Frank R. Townsend.)

think I worked the whole month.

Q. In any of these trips just prior to that had you been out over sixteen or twenty-four hours on the run to Teikhell?

A. I couldn't recall now except in looking over an old slip-book I found the trip previous to that we were out more than that. [292—243]

Q. The trip just previous? A. Yes, sir.

Q. You all knew pretty well when you left here that you had no reasonable expectation of getting up there much under twenty-four hours, didn't you?

A. Well, I didn't know the condition of the road up above 51 where we broke down—I couldn't tell. There was heavy snow where we turned back—we broke the rotary down and turned back. I couldn't tell how far that snow extended.

Q. On the trip before that it had taken you considerably over twenty-four hours?

A. I don't recollect the trip before that. This was the trip we broke down, leaving on the 28th, I had reference to.

Q. Prior to that time?

A. I don't remember how long we were on the road.

Q. Do those slips you refer to indicate?

A. They probably would.

Q. Have you them with you? A. No, sir.

Mr. COBB.—That will be all.

(By Mr. BORYER.)

Q. Is it not a fact that one trip may take you three days or four days to make it and the trip following,

(Testimony of Frank R. Townsend.)

you will make the same trip in eight to ten hours?

A. Yes, sir.

(By Mr. COBB.)

Q. And along that time of the year you may expect 24 to 30 hour trips any time, to Teikhell?

A. You can expect it; yes, sir.

(By Mr. BORYER.)

Q. Do you frequently have trips that you go [293—244] down at that time of the year in eight or ten hours? A. Yes, sir.

Q. (By Mr. COBB.) Coming down is always quicker than going up?

A. Not always,—usually.

Witness excused.

Mr. COBB.—I will call Mrs. Reed.

[Testimony of Esther A. Reed, in Her Own Behalf.]

ESTHER A. REED, the plaintiff, called and sworn as a witness in her own behalf, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Esther A. Reed.

Q. What relation were you to John E. Reed in his lifetime? A. Wife.

Q. Have you any children? A. Yes, sir; two.

Q. What are their names and ages?

A. Verne Reed is eight years old now and Kenneth is three.

Q. You are the plaintiff in this case?

A. Yes, sir.

(Testimony of Esther A. Reed.)

Q. The same Esther A. Reed who was appointed administratrix of the estate of John E. Reed?

A. Yes, sir, I am.

Q. How long had you been married to Mr. Reed?

A. At the time of the accident?

Q. Yes. [294—245] A. Eight years.

Q. You remember his leaving here on the 30th?

A. Yes, sir.

Q. Was that the last time you saw him?

A. It was.

Q. What was his age?

A. He was 31 years old.

Q. Were Mr. Reed and yourself happy in the marriage relation? A. Very happy.

Q. When did you first hear of his death?

A. About 11 o'clock on the night of the first of January.

Q. Do you remember how you heard it?

A. Yes, sir.

Q. How was it?

A. I was in my own home—I was told by a friend of mine.

Q. Did you ever see the body afterwards?

A. Not until I had got to Bozeman, Montana.

Q. When did you leave for Bozeman?

A. I left here, I think it was, the 16th of January—15th or 16th.

Q. After you took out the administration papers?

A. Yes, sir.

Q. That was to get the money in Seattle that was on deposit in the bank there?

(Testimony of Esther A. Reed.)

A. That was why I took my letters out here.

Q. Then you left here shortly after that, after you took out the letters, which was on the 17th?

A. I don't remember the date, but it was some time after I took out the letters.

Q. Why didn't you see it here—hadn't they brought it here at that time? [295—246]

A. I don't think so.

Q. How long were you in Seattle before you received the casket? A. About a week, I think.

Q. Did you take it back then to Bozeman, Montana, for interment? A. Yes, sir.

Q. Did you pay all the expenses of that trip?

A. Yes, sir.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. You say you paid all the expenses of that trip—do you mean from Seattle into Montana?

A. With the exception of one fare from here to Seattle.

Q. The expenses, the funeral expenses here, and the fare of Mr. Reed's brother, was paid from here to Seattle?

A. I don't know, I wasn't here—I didn't pay those.

Q. All of the funeral expenses here were paid, were they not?

A. I suppose they were—I don't know what the expenses were here.

Q. You never received any bill for the casket or

(Testimony of Esther A. Reed.)

clothing or anything? A. No, sir.

Q. Do you recall meeting me in Seattle?

A. I do.

Q. Do you recall if Mr. Reed's brother was in Seattle?

A. He was; that is the brother that is working here for the company now—he came down with the body.

Q. That is the brother that is working here now?

A. Yes, sir. [296—247]

Q. Do you remember me offering to render assistance there on behalf of the company, any and all assistance?

A. After my expenses and affairs were all ready and I was ready for the trip east I remember that; yes.

Q. Do you recall you came in on one boat and I located you the next day, was it not?

A. It was not.

Q. What day was it?

A. It was the day—I was to leave in the morning, going east—it was that evening, that afternoon.

Q. That was a day or two before the remains came to Seattle, was it?

A. It was the afternoon, and the remains came the next morning some time, early.

Q. I had been out to see you and you were out somewhere—I had to wait or come back?

A. I was in Seattle when you came out that afternoon.

Q. And you were not at home at that time?

(Testimony of Esther A. Reed.)

A. No, I came while you were there.

Q. And I took the matter up with you at that time?

A. You asked me if everything was all ready, and I said I had made my preparations to go east.

Q. Your husband was 31 years old?

A. He was.

Q. Was he older than his brother that is working here at the present time? A. Yes, sir.

(By Mr. COBB.)

Q. Do you know what Mr. Reed was earning and had been for some time? [297—248]

A. \$250 a month, I think, or more.

Q. He had some extra time?

A. Yes, he often had \$300 a month.

Q. It was always as much as \$250? A. Yes, sir.

(By Mr. BORYER.)

Q. What proportion of that did he give you?

A. I had all of it.

Q. He turned it all over to you? A. He did.

Q. For you to use or to keep for him?

A. To keep—to use what was necessary for our expenses.

Q. About how much would you use per month?

Mr. COBB.—I don't think that is a fair question, and is not material.

The WITNESS.—It is according to where we were living.

By the COURT.—What is the purpose of the question?

Mr. BORYER.—The purpose is to show what por-

(Testimony of Esther A. Reed.)

tion of his salary was used in the household expenses and given to her.

By the COURT.—I don't see that that would have anything to do with the elements of damages that would be necessary if any are considered by the jury, as I understand the law—unless you can call to my attention something I have overlooked.

Mr. BORYER.—That is a point I want to reserve in the case.

By the COURT.—You may reserve it—exception allowed.

Mr. COBB.—I have agreed with Mr. Boryer that to obviate the necessity of calling the life insurance agent, we may read into the record from the tables of life insurance of the Equitable Life Assurance Society of New York, the life [298—249] expectancy of a man 31 years of age.

Mr. BORYER.—That is correct.

Mr. COBB.—The life expectancy of a man 31 years old is 34.6 years.

Juror PEDERSEN.—I would like to ask if the expectation of life in that case is affected by one's vocation?

By the COURT.—That may be a matter that I will have to instruct you on later.

Plaintiff rests.

WHEREUPON Court adjourned until to-morrow (Saturday) morning at 9 o'clock. [299—250]

[Testimony—Defense.]

[Testimony of R. J. De Leo, for Defendant.]

Saturday, May 3, 1913.

MORNING SESSION.

R. J. DE LEO, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your name? A. R. J. De Leo.

Q. By whom are you employed at present?

A. Copper River & Northwestern Railway Co.

Q. By whom were you employed in December, 1911? A. By the same company.

Q. And have been in the employ of the same company ever since? A. Yes, sir.

Q. I will ask you if you had a time-table in effect at that time? A. Yes, sir.

Q. Is this same time-table in effect at present?

A. Yes, sir; it is.

Q. And was and has been ever since the first day of December, 1911?

A. It was in effect as of the date shown in the time-table.

Q. What is the date shown in the time-table?

A. October 16, 1910.

Q. I will ask you if all trainmen, including firemen and engineers, are required to be familiar with the time-table.

A. They are required to have a current time-table in their possession.

Q. What is your position?

(Testimony of R. J. De Leo.)

A. Chief clerk to the superintendent. [300—251]

Q. What was your position in December, 1911, and January, 1912? A. The same.

Q. I will ask you who was superintendent at that time. A. George Geiger.

Q. I will ask you if George Geiger is in the employ of the Copper River & Northwestern Railway Co. at the present time. A. No, sir.

Q. I will ask you where is now, if you know?

A. I don't know.

Mr. BORYER.—We desire to have this time-table admitted as an exhibit.

It is admitted, without objection, marked Defendant's Exhibit "2."

Q. I will ask you if this time-table, which I have handed you and which has been marked Defendant's Exhibit 2, provides any rules or has any references to any rules.

A. The time-table is used by the railroad. It contains a schedule of the regular trains, covering their movements and the movements of the trains are subject to the rules. This also gives you the distances between the various points beginning at Cordova and ending at Chitina. You will notice the miles are designated beginning at Cordova and coming back the same way on this side.

Q. This time-table says, "Bulletin Books are located in the Dispatcher's office, Cordova, and at Chitina." I will ask you if you have and had at the time of this accident a Bulletin Book in the office at Cordova. A. Yes, sir; we had.

(Testimony of R. J. De Leo.)

Q. I will ask you if this bulletin, which is a copy taken from the book that was here yesterday, and reading:

“Cordova, Alaska, July 16, 1910. [301—252]

To All Engineers, Firemen, Hostlers and all Concerned:

Do not fail to extinguish *ALL* fire in ashes removed from ash pans. No excuse will be taken for the burning of ties, or other damage to property, as a result of a failure to do this. Engineers will be held equally responsible with their firemen in this matter.

(Signed) J. R. VAN CLEVE,
Superintendent.”

I will ask you if that bulletin was in the bulletin-book referred to in the time-table during the month of December, 1911, and the month of January, 1912?

A. Have you the bulletin-book here?

Q. Yes. I hand you the bulletin-book and ask you if that is an exact copy of the bulletin and rule contained in the bulletin-book.

A. Yes, sir; it is an exact copy of the bulletin that is in the book.

Q. I will ask you if you know when you were placed under the Interstate Commerce Commission.

A. September 1, 1912.

Q. I will ask you if you know that until that time the Interstate Commerce Commission would not take this under their jurisdiction, do you or do you not?

A. I do not know.

Q. I will ask you if you know of your own knowledge that the Secretary of the Interior refused to

(Testimony of R. J. De Leo.)

take us under the jurisdiction, to take the railroad under the jurisdiction? A. I don't know.

Q. I will ask you who had charge here prior to the time that Mr. Geiger took charge?

A. You mean the superintendent? [302—253]

Q. Yes.

A. Mr. Van Cleve was the superintendent—J. R. Van Cleve.

Q. Who was general manager?

A. E. C. Hawkins.

Q. I will ask you if Mr. Hawkins is not dead.

A. Yes, he is.

Q. I will ask you if you know where Mr. Van Cleve is.

A. The last I heard from him was indirectly from Portland, Oregon.

Q. I will ask you where the head offices of the Railway Co. are located.

A. They have offices in Seattle and in New York. Mr. BORYER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. Referring to this time-table, how close were the trains, in December, 1911, following that schedule?

A. Following the schedule?

Q. Yes.

A. I don't know exactly what you mean by that question.

Q. What I mean is, were you running on that schedule as an actual fact?

(Testimony of R. J. De Leo.)

A. They were running under that time-table; yes, sir.

Q. I didn't ask you that. I asked you if, as a matter of fact, they were running on that schedule.

A. You mean were they on time, according to that schedule?

Q. Yes.

A. No, sir; they were not—I would have to refer to the train-sheets to find out.

Q. The train-sheets would show what was the actual running? A. Yes, sir. [303—254]

Q. That schedule produced here is just what was supposed to be—what you intended to keep up, summer and winter, was it not?

A. Yes, that was what they were operating under.

Q. Mr. Hawkins who is dead was not superintendent at that time and general manager?

A. At what time?

Q. In December, 1911, and January, 1912—he had gone out then, had he not?

A. I think he still held that title, but I am not sure of the date.

Q. Mr. Geiger was superintendent at that time?

A. Yes, sir.

Q. And had charge of the road? A. Yes, sir.

Q. You referred here to the road being placed under the Interstate Commerce Commission in September, 1912. What do you refer to, the decision in the Humboldt case? A. I don't get the question.

Q. You stated in your testimony here in answer to Mr. Boryer that the road came under the Interstate

(Testimony of R. J. De Leo.)

Commerce Commission in September, 1912. Do you refer to the decision in the Humboldt case then?

A. All I know, we received advices from our general offices to the effect that from that date we would be under the jurisdiction of the Interstate Commerce Commission, and would be governed by their rules and regulations.

Q. And the laws passed pursuant thereto?

A. Yes, sir.

Q. Don't you know that that was based on the decision of the Supreme Court of the United States in the Humboldt case, commonly known as the Humboldt case, and the Interstate [304—255] Commerce Commission always had been in effect up here? A. I don't know.

A. I don't know.

(By Mr. BORYER.)

Q. I will ask you if you have that letter, giving you those instructions, with you?

A. No, I have not—I might have it here. I have a letter from him stating that we would be under the jurisdiction in effect August first and that was afterwards changed to September first, on account of the railroad not being able to get around to meeting the requirements of the commission by August first, 1912.

Q. I hand you a letter under date of June 3, 1912, signed R. W. Baxter to George Geiger, Superintendent, Cordova, Alaska, and ask you if that is the letter you have reference to. A. Yes, sir, it is.

Mr. BORYER.—We desire to offer this in evidence.

(Testimony of R. J. De Leo.)

Mr. COBB.—I don't think it is very material but I have no objection to it.

The letter is marked Defendant's Exhibit "3" and admitted in evidence.

Q. I hand you Defendant's Exhibit #3 and ask you if that is the letter we have been speaking of and to which you have reference. A. Yes, it is.

Mr. BORYER.—I will read it.

By the COURT.—I will say this to the jury—a letter from Mr. Baxter to this company, to this superintendent, probably would not be relative evidence at all unless it is later on connected with the Interstate Commerce Commission to Baxter · [305—256] or someone else. I do not understand that Baxter belongs to the Interstate Commerce Commission, or represents them in any way.

Mr. BORYER.—No, he is connected with the company. We will connect Baxter up all right.

Q. Who is Mr. R. W. Baxter?

A. He is Vice-president of the Copper River & Northwestern Railway Co.

Q. Do you know if he is acting president of the same company? A. I don't know.

Q. He is the man who has charge of the Copper River & Northwestern Railway Co., isn't he—all business from his office is transacted through him?

A. All business we have is transacted through him, yes, sir.

Q. Do you know that Mr. George Geiger received this letter? A. I know that he saw that letter.

(Testimony of R. J. De Leo.)

Q. Do you know that he received it in the mail?

A. Yes, sir.

Q. Mr. Geiger is where, now?

A. I do not know.

Q. Is he in Alaska? A. No, sir.

Mr. BORYER.—I will now read the letter.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY.

Seattle, Washington, June 3, 1912.

R. W. Baxter,

Vice-President.

Mr. Geo. Geiger,

Superintendent, Cordova, Alaska.

Dear Sir:

We have been advised by the Interstate Commerce Commission that they will take charge of all railroads in Alaska August 1st, after which time it will be necessary for us to comply in all respects with the Commission's requirements and for your information and guidance am sending you under separate cover, one copy each of [306—257] Act to regulate commerce (as amended) and acts supplementary thereto, which include, Commerce Court Act, Safety Appliance Acts, Act Requiring Monthly Report of Accidents, Arbitration Act, Hours of Service Act, Boiler Inspection Act, Tariff Circular #18A and supplement #2 thereto and General Order #11.....

Conference Rulings Bulletin #5, with Supplement #1 thereto and other supplements, bringing the Commission's conference rulings up to date

(Testimony of R. J. De Leo.)

Please acknowledge receipt of these publications, advising that you will comply with the requirements of Commission.

Yours truly,
(Signed) R. W. BAXTER,
V. P.

(By Mr. COBB.)

Q. Have you been complying with the laws providing for the safety of employees since receipt of that letter?

A. Have we been complying with them did you say?

Q. Yes. A. Yes, sir, we have.

Mr. BORYER.—We object to it as immaterial and incompetent.

Objection sustained.

Witness excused. [307—258]

[Testimony of J. W. Forrester, for Defendant.]

J. W. FORRESTER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your name? A. J. W. Forrester.

Q. Where do you live?

A. Chitina.

Q. By whom are you employed?

A. Copper River & Northwestern Railway Co.

Q. How long have you been employed by the Copper River & Northwestern Railway Co.?

(Testimony of J. W. Forrester.)

A. I have been working on the railroad about five years.

Q. Were you working for the defendant Railroad Co. during the months of December, 1911, and January, 1912? A. Yes, sir.

Q. I will ask you to state what, if anything, you know concerning the accident at Bridge 75A on the first day of January, 1912. State if you were there, or when you first reached there and what you did.

A. I was not there when the accident occurred. I got there, I think it was the 5th of January—the accident occurred on the first, but there hadn't been anything disturbed up to the time I got there. The rotary was lying over on her right side where she tipped off the bridge and the cords on both sides of the bridge had been burned—on the left-hand side coming toward Cordova.

Q. Perhaps you can describe it a little better from this blue-print, when you get to it (handing witness blue-print).

A. The cords on both sides of the bridge had been burned. The cords of our standard bridge are built of— [308—259]

Q. Are the cords the same as the stringers?

A. Yes, sir; they are built up out of three 8x18 timbers—they are 8 inches wide and 18 inches deep. There is a four-inch space between each one of these stringers and the fire had run along on the inside of these stringers on both sides of the bridge, but on the left-hand side coming toward Cordova the fire had

(Testimony of J. W. Forrester.)

not run as far back, had not burned the cord out, as far as it had on the right-hand side, and on the right-hand side there was about—this represents a pile bent here, the standard pile bent; these two piling here were burned off right on the bottom flush with the top of the ice and the cord was burned out back of that bent—that was the third or fourth bent coming towards Cordova on the bridge.

Q. How is that?

A. This shows the standard pile bent. There are five piling in the bent. Those two piling, the third or fourth bent, I am not positive which, were burned off flush with the top of the ice and there was a pile of coal, cinders and ashes, left around those two piling, where it looked as if it was where the fire had been cleaned and the ashes shoved around them and there wasn't any part of this piling left, as I noticed after I got there and the cord on the right-hand side of the bridge had burned, from that point back toward Chitina probably the distance of a bent, that would be 16 ft. and had run ahead probably 35 or 40 ft. further, and on the other side of the bridge, on the left-hand side, the cord had not burned back that far,—it was not burned back as far as it was on the right-hand side. Those two piling were burned off right flush with the top of the ice.

Q. (By JUROR.) The full length of them?
[309—260]

A. The full length of them; the stem probably stood up five or six feet above the top of the ice and

(Testimony of J. W. Forrester.)

they had burned from that pile of cinders and ashes all the way up.

Q. Now, what end of the bridge was that?

A. That was on the Chitina end of the bridge.

Q. What has been termed here the north end?

A. Yes, sir.

Q. Now, as I understand you, the stringers, or the cords as you call them, run under the track and support the track?

A. Support the ties and the rails and the guard rails; there are three stringers.

Q. What is the size of those stringers?

A. 18 inches deep and 8 inches wide.

Q. Then they are placed side by side?

A. Four inch space between them.

By the COURT.—Then there are more than three on the bridge?

A. There are three on each side, six altogether—three in each cord.

Q. So that the track then is over—on top of that you put a tie, do you not? A. Yes, sir.

Q. And then on top of the tie you put the rail?

A. Yes, sir.

Q. Then right under that rail you have three cords? A. Three stringers.

Q. That has an opening between each stringer of 4 inches? A. Yes, sir.

Q. That is true of the other side, is it?

A. Yes, both sides.

Q. That would be true—the same opening would

(Testimony of J. W. Forrester.)

be across the cap [310—261] upon which these stringers rest, would it not? Those stringers rest on the cap?

A. Yes; there is 30 inches, if I remember correctly, between the cords in the clear on top of the cap.

Q. You don't catch my question. Here is your cap coming across for the purpose of supporting your stringers? A. Yes, sir.

Q. Now, then, you have three stringers. That would be your position of the stringers across the cap, would it not? A. Yes, sir.

Q. And across there would be a tie?

A. Yes, sir.

Q. Now, then, if ashes were sifted down that were pulled from off of this cap here, they would naturally go down between the ties and down between these stringers or cords and land on the cap, would they not? A. Yes, sir.

Q. Then they couldn't get through the cap, could they?

A. No, the cap was 14 inches wide. They would drop through this space on the cap.

Q. And if they were pulled away from this cap, ahead of it or back of it, then the ashes would fall down between the ties, would they not?

A. You mean if the ashes were left on the cap and being pulled off the cap? If the ashes were lying on the cap—if the ashes were lying on the deck, on the ties and being pulled off, they would drop on the cap.

(Testimony of J. W. Forrester.)

Q. When you get away from that cap there are ties across that—there is no cap under there?

A. Yes. [311—262]

Q. And if ashes were pulled off of the ties that didn't have a cap under them, those ashes would drop down to the ground? A. Yes, sir.

Q. When you reached there—you say you reached there on the morning of the 5th?

A. I think that was the date, I am not positive—4th or 5th.

Q. Did you ride or walk down?

A. We mushed down.

Q. Ahead of the train?

A. The train brought us part of the way.

Q. Who was with you?

A. I brought a crew of men down—I don't remember who all.

Q. Had the bridge been disturbed?

A. No, sir, there had been nothing done to it at all.

Q. Now, I will ask you what in your opinion caused that bridge to burn?

A. Why, I think that the pan that had been dumped there, the ashes from that pan, had been pushed off in between the stringers, so they lodged on top of the cap and some had gone down around the bottom of these two piling and burned the piling off and all the stringers that were burned were burned inside, in this space, in this 4-inch space. For instance, you could stand off at the side of the bridge where the cord was still standing—the cord

(Testimony of J. W. Forrester.)

was not knocked down near the rotary on the left-hand side of the bridge—you could stand on one side of that and wouldn't see but very little evidence of fire having been in that cord at all, but these 8-inch stringers, that were originally 8 inches wide, at some places they were not more than an inch [312—263] thick—the fire had run right along in this space.

Q. Was that on the right-hand side going up—that was on the right-hand side going up that the cord had not broken down? A. Yes, sir.

Q. And they were burned on the inside?

A. Yes, sir.

Q. Now, then, was it burned directly over the place where you found the ashes?

A. Yes, those two pilings had been destroyed by fire and the end of that cap was burned off and I don't know what had become of the cord—it had burned up so much that I didn't notice any pieces of it lying around there, still you could not tell; the rotary had mashed it down.

Q. I believe you heard Mr. Lee and Mr. Holden testify that when they arrived there that night, at the time of the accident, that the wind was blowing across in front of the rotary from the river side, over toward the glacier, that would be from the right-hand side of the track going up, over toward the left-hand side? A. Yes, sir.

Q. I will ask you if that is the prevailing wind around there?

(Testimony of J. W. Forrester.)

A. Yes, the wind blows that way most all the time in the winter.

Mr. BORYER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. You say you went down there on January 5th?

A. I think that was the date; yes, sir.

Q. You went down with the first crew that went back there afterwards? [313—264]

A. Yes, sir.

Q. What did you go down for?

A. To raise the wreck and recover Reed's body.

Q. Did you succeed in raising the wreck and getting out his body? A. We did.

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained.

Mr. COBB.—It is not denied in this case anywhere except in the pleadings that Mr. Reed was killed there.

Mr. BORYER.—I admit that Mr. Reed was killed.

Q. You did see his body? A. Yes, sir.

Q. Now, then, had there been any snow fallen the time when you went down there?

A. I couldn't say.

Q. You couldn't tell whether there had been any further snow or not?

A. The wind had been blowing all the time and the track was drifted nearly full. I don't remember whether there was any snow *fallen* or not.

(Testimony of J. W. Forrester.)

Q. Was the fire still burning?

A. No, the fire was entirely out at that time.

Q. Was there any snow on top of the ashes to speak of?

A. There was some snow on top of the ashes. They were partly covered but there was still some of them that showed above the snow.

Q. You made no search for any other ashes, at other places?

A. No, I did not, any more than I dug up this place where the [314—265] bridge had been destroyed to build a new bridge.

Q. *How of* that bridge had been burned on the right-hand side? A. Coming towards Cordova?

Q. Yes, on the right-hand side coming towards Cordova?

A. Probably 45 or 50 ft., more or less, I think.

Q. How much of it had been burned on the left-hand side, the other side?

A. I would say about probably 20 ft.—less than had been burned on the other side.

Q. Most of the burning was on the right-hand side?

A. Most of the burning was on the right-hand side, coming towards Cordova, yes, sir.

Q. What sort of timbers was the bridge built of?

A. Fir timbers, sawed timbers.

Q. That is rather an inflammable timber, easily set afire? A. Yes, I guess it burns.

Q. That had been your experience with it since you have been on the road?

(Testimony of J. W. Forrester.)

A. We have never used it for firewood or anything like that.

Q. You had it out on the road?

A. Yes, all our bridges are constructed of that kind of timber.

Q. Any others ever get on fire that way?

A. I never saw any of them; no, sir.

Q. Did you ever hear of it?

A. I have heard of one bridge catching fire since I have been there.

Q. You know as a matter of fact that is inflammable timber?

A. I think it would burn as quickly as most any kind of timber.

Q. (By Juror McNIECE.) Were the caps burned, over toward the right-hand side coming toward Cordova?

A. Yes; if I remember correctly there were three caps that [315—266] were burned off, entirely destroyed, just about the middle of the bridge—the right-hand end coming towards Cordova.

Q. (By Juror HUNT.) In your testimony you stated that the two piling on the right-hand side leaving Cordova— A. No, coming toward Cordova.

Q. (By Juror HUNT.) That would be the river side?

A. No, it wouldn't be the river side—the two piling in the third or fourth bent coming toward Cordova.

Q. (By Juror HUNT.) That would be opposite the river, the glacier side? A. Yes, sir.

(Testimony of J. W. Forrester.)

Q. These pilings that were burned off were on the right-hand side coming towards Cordova?

A. Yes, sir.

Q. That is the way I understood it.

A. Yes, sir.

Q. Right opposite where the rotary fell?

A. The cord had been burned back to just behind the bent towards Chitina from that and the rotary in tipping over had broken off one or two piling in that bent as she went over.

Q. These that were burned off, were they opposite to or ahead of where the rotary turned over?

A. Just ahead.

Q. On the same side as the rotary fell?

A. Yes, the cord had burned at that point.

(By Mr. BORYER.)

Q. Give to the jury a description of the piling that was *acrossed* each one of those bents.

A. There were five piling in each bent—there was a good battened [316—267] pile on each side and the load pile that was directly under the rail, that was also battened a little bit, and then the pile directly in the middle of the bridge, the piles outside of the bent, were battened.

Q. Bracing piles?

A. Bracing piles; yes, sir.

Q. (By Juror MANTHEY.) Were they piles or framed bents? A. They were piles.

Witness excused.

**[Testimony of Harry N. Wilson, for Defendant
(Recalled).]**

HARRY N. WILSON, recalled as witness in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. Where were you working during the month of December, 1911, and January, 1912?

A. The Copper River & Northwestern Railway.

Q. Have you been in the employ of that company ever since that time? A. Yes, sir.

Q. What is your official position at this time?

A. Trainmaster.

Q. How long have you held this position?

A. About two months.

Q. How long have you been railroading? [317—
268] A. Twenty-one years.

Q. All the time?

A. Practically all the time; yes, sir.

Q. Have you followed any other vocation other than that? A. No, sir.

Q. How long have you been working for the Copper River & Northwestern Railway Co.?

A. About three years.

Q. Where were you working before you came here?

A. Working for the Great Northern.

Q. How long did you work for the Great Northern?

A. About five years.

Q. Did you work for any other railroad?

A. Yes, I worked for several.

Q. I will ask you if you were on the rotary train

(Testimony of Harry N. Wilson.)

that left here on the 30th of December which met with an accident at Bridge 75A on the first day of January, 1912? A. Yes, sir.

Q. I am not going to ask you to go through all of that, but I am going to ask you if you heard the evidence to the effect that you held a consultation after this accident. A. Yes, sir.

Q. Where did you go after this consultation?

A. Went to Chitina.

Q. When you came back, how long did you stay in Chitina?

A. I am not positive whether we left there on the third or fourth.

Q. Where did you go then? A. Went to 78.

Q. Who was with you? [318—269]

A. There was Mr. Forrester and the gang of men—I don't know just how many—I don't recall just how many men.

Q. How did you go?

A. The train took us as far as Mile 98 and we walked from there.

Q. Walked from 98 to— A. 78.

Q. 78 or 75? A. 75, the bridge.

Q. Tell the jury what you saw there in connection with the fire, at that bridge.

A. When we reached there?

Q. Yes. Did you examine or see the bridge?

A. I didn't go to the bridge until the next morning. The men went down and they had some of the bridge torn up when I reached there and were preparing to raise the rotary. They took some of the stringers out

(Testimony of Harry N. Wilson.)

but I don't just recall what the burning was or how much it was.

Q. Did you examine the bridge at that time?

A. No, not very closely.

Q. Did you examine it at all?

A. I walked over it but I couldn't recall just how much of it was burned. I know it was burned pretty bad on the right side going south and was burned on the other side some, but I couldn't say just how much.

Q. You didn't examine it closely?

A. No, not enough to give any evidence.

Q. And you wouldn't like to express an opinion as to what you thought caused it?

A. No, sir. [319—270]

Q. Now, I will ask you if when you left here—if counsel will pardon me for leading questions—

Mr. COBB.—Anything to get at the facts as quickly as possible.

Q. You left here on the 30th? A. Yes, sir.

Q. You arrived at Mile 52 and had an accident there with your rotary? A. Yes, sir.

Q. What rotary was that?

A. X2—the large rotary.

Q. What happened after you broke this rotary?

A. We backed to Mile 39.

Q. Why did you go back there?

A. We went back there to get water and keep out of the wind until they brought another rotary to us from Cordova.

Q. Did another rotary come? A. Yes, sir.

Q. How long after you arrived at Mile 39 with this

(Testimony of Harry N. Wilson.)

crippled rotary did this other rotary arrive?

A. I think it was 3:30 in the morning, if I remember right.

Q. Then what did you do with the crippled rotary?

A. We took it to Miles Glacier and the other crew took it and brought X1 to us.

Q. The crew that brought X1 to you took X2 back?

A. It took the disabled rotary.

Q. To what place?

A. We left them at Miles Glacier and I understand they took it to Cordova.

Q. For what purpose? [320—271]

A. Repairs.

Q. Then you proceeded northbound with the rotary X1, the small rotary? A. Yes, sir.

Q. Those were the two rotaries that were owned by the company at the time?

A. At that time, yes, sir.

Q. Then you proceeded north and reached Bridge 75A, did you not? A. Yes, sir.

Q. You took water there, did you? A. Yes, sir.

Q. Then after taking water you went up to Teikhell? A. Yes, sir.

Q. I believed you testified that when you got to Teikhell that you and Scott and who else, took the rotary? A. Taylor.

Q. Took the rotary on up for water and turned it around the loop and headed it south, for Cordova?

A. Yes, sir.

Q. Then the rotary crew were relieved at that point, were they, as soon as you arrived there?

(Testimony of Harry N. Wilson.)

A. That is as I recall it; yes.

Q. Then you started south about 4 o'clock, I understand, in the evening; is that correct?

A. Of that day, yes, sir.

Q. You arrived at this scene of the accident about what time? A. I think it was 7:30 or about that.

Q. Now, the night that you stopped at Bridge 75A for water, did you see anyone cleaning their pans there? [321—272] A. I did not.

Q. I will ask you who has charge of your engines when they start out?

Mr. COBB.—We object to that—he is a conductor and not an engineer.

Objection overruled.

Q. What is your official position?

A. Trainmaster.

Q. What does the trainmaster do—what are his duties?

A. He has charge of the trains and engine-men, to assist the superintendent in his duties and general work.

Q. I will ask you in whose care you put an engine when you send it out. A. The engineer.

Q. Is he responsible for that engine?

A. He has charge of it; yes, sir.

Q. You look to him to take care of that engine, do you not? A. Yes, sir.

Q. Does he have supervision over the fireman?

A. Yes, sir.

Q. I will ask you if, on all the roads you have worked, it is not against the rules to dump ash-pans—

(Testimony of Harry N. Wilson.)

against the rules and regulations, to dump ash-pans or fires, or to permit them to be cleaned on switches, frogs, interlocking apparatus and bridges?

A. Yes, sir.

Q. I will ask you if it is not a fact that all roads require that the engineer is to be held responsible for the fireman's conduct and that he must report any inefficiency or neglect. [322—273]

A. How is that? On all roads?

Q. On all roads that you have worked on?

A. As near as I can remember, that is the rule on all roads.

Q. I will ask you who instructs the fireman as to the manner of cleaning his fires, the manner in which he feeds his fire and the manner in which he keeps up his steam and the manner in which he uses the quantity of coal and oil such as you are using?

Mr. COBB.—We object to that unless the witness qualifies as an engineer and has had some experience in that line of business.

Objection overruled. Plaintiff allowed an exception.

A. The engineer is supposed to instruct his fireman in his duties, as I understand it.

Q. Is it his duty to see that he complies with the rules? A. I should think so; yes.

Q. As a matter of fact he does, does he not, and is required to? A. Yes, sir.

Mr. BORYER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. Were you ever an engineer? A. No, sir.

(Testimony of Harry N. Wilson.)

Q. You are a superior officer now to the engineers—you are trainmaster? A. Yes, sir.

Q. Are you responsible for them?

A. Yes, in a way.

Q. Just the same way that the engineer is responsible for the [323—274] fireman?

A. Yes, sir.

Q. Who is your superior officer?

A. The superintendent.

Q. He is responsible for you? A. Yes, sir.

Q. And so on? A. I presume so.

Q. And when you get talking about the responsibility of the engineer for the fireman, it is the same responsibility that each superior officer has for his inferiors, is it not?

A. Well, I couldn't say as to that part of it for sure.

Q. What is the distinction? Tell the jury if there is any.

A. Well, if you put a man with the engine, he has charge of the engine—that is the question I was asked.

Q. You are referring particularly to locomotives?

A. No, not necessarily—the conductor has charge of the train.

Q. You have been in these rotaries?

A. Yes, sir.

Q. You know the position of the engineer and his duties in these rotaries are different from what it is on a locomotive?

A. Yes, sir, his duties are different.

(Testimony of Harry N. Wilson.)

Q. And you heard these gentlemen that have been in the rotaries explain where the engineer stands in them, where he has to be to attend to his duties?

A. Yes, sir.

Q. He can't see out—that is all true?

A. All true.

Q. And his fireman is way back behind the engine where he can't [324—275] see him half the time; that is all true? A. Yes, sir.

Q. That is not true of a locomotive, however—the fireman and engineer are right together, aren't they?

A. Yes, sir.

Q. Now, you testified a little while ago, about leaving here on this train on the 30th—as a matter of fact, you were conductor on the rotary outfit, on the caboose and the two hog engines that were pushing?

A. Yes, sir.

Q. When you left here you knew pretty well about how long it was going to take you to get up to Teik-hell? A. I can't say I had the slightest idea.

Q. You didn't expect to get up there inside of 15 or 20 hours?

A. I don't remember that I gave the matter any thought what time it would be.

Q. You know it had been taking all that time to make a number of trips just preceding that?

A. Probably did at the time. I don't remember now whether it did or not.

Q. And when the big rotary broke down you wired back to Cordova for another rotary and another crew brought that rotary out? A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. Still the company sent the same crew that had left here at 11:45, on the *on the* relief rotary, changed off and sent them on through with it, didn't they?

A. Yes, sir.

Q. They knew they could not get up there under those conditions under thirty or forty hours, didn't they? [325—276]

A. I don't know in regard to time—I couldn't say how long it would take. I don't think the company could at that time.

Q. You knew it would take a long time?

A. I don't know—I don't know that anybody knew what the snow conditions were at that time.

Q. They have a line of telegraph up the road?

A. Not in the worst snow belt—you don't have any telephone communications.

Q. You have telegraph? A. Yes, sir.

Q. They can hear what is going on up the road any moment they want to, can't they?

A. You don't understand me. Where the worst snow or worst delay was, there was no telephones, over the flats.

Q. You have no means there of finding out?

A. No, only through the train.

Mr. COBB.—That will be all.

(By Mr. BORYER.)

Q. At the time you started out here on the 30th, don't you know that they started a train out from Chitina on the same day to meet that train?

A. Yes, sir.

(Testimony of Harry N. Wilson.)

Q. Now, then, I will ask you if it is possible for anybody to tell how long it will take you to go between any two points on the Copper River & Northwestern Railway during the winter? A. No, sir.

Q. Is it not a fact that you may start out here in the morning at 8 o'clock in December or January and arrive at Chitina at 4 or 5 o'clock that evening, and again you may start out [326—277] of here and you would not get as far as 49 in that same length of time? A. That is the condition.

Q. And you can't tell a thing about it until you meet the snow conditions along the line, can you?

A. No, sir.

Q. As a matter of fact, you may get as far as Abercrombie Canyon and when you leave here there will be no snow on the track at all—isn't it possible during the winter-time? A. Yes.

Q. And five minutes before you get there, there may be a slide that will fill that canyon so it will take you two or three days—isn't that a fact?

A. Yes, sir.

Q. Isn't that a fact at other points along the line?

A. Yes, at some points it is.

Q. Now, then, you had charge of this rotary crew, you say, that went out, started from here, on the 30th? A. Yes, sir.

Q. Now, when X1 met you at Miles Glacier was there any of the crew that wanted to come back home that you know of?

Mr. COBB.—We object to that as irrelevant and immaterial.

(Testimony of Harry N. Wilson.)

Q. Did any of them raise any protest as to going any further?

Mr. COBB.—We object as irrelevant and immaterial.

Objection sustained. Defendant allowed an exception.

Q. I will ask you if they did not proceed willingly, northbound?

Same objection.

By the COURT.—I consider it makes no difference under the law whether the employees wanted to work or not. [327—278]

Defendant allowed an exception.

Q. I will ask you if the reason you were delayed on that trip was because of the breaking of your rotary and the weather conditions?

A. That was the principal delay; yes, sir.

Q. Wasn't that the only reason that you were delayed?

A. There might have been other small delays that I don't recall.

Q. You don't recall any, do you? A. No, sir.

Q. Then it was because of the weather conditions and because of the breaking down of the rotary?

A. Yes, sir.

Q. Now, then, you were going from Terminal No. 1 to the next terminal, Teikhell, is that correct?

A. Yes, sir.

Q. That was your first terminal after leaving Cordova? A. Yes.

(Testimony of Harry N. Wilson.)

(By Mr. COBB.)

Q. The answer how far you are going to get on this road in December prevails on any mountain road, subject to heavy snowstorms, the same sort of answer?

A. That I can't say that it prevails on every mountain road.

Q. I say that are subject to heavy snowstorms.

A. I suppose any road that is subject to heavy snowstorms are liable to delays.

Witness excused.

Testimony closed. [328—279]

Whereupon defendant filed its motion for a directed verdict as follows:

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Motion for Directed Verdict.

Comes now the defendant and moves the Court for a DIRECTED VERDICT in this action for the following reasons:

1.

Because plaintiff bases her cause of action upon

the negligence of the defendant, which negligence consisted in the “Defendant allowing its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.”

That the plaintiff's witnesses have admitted and established that the fireman on the rotary dumped the ashes from the rotary on the roadbed, which witness also admitted that the engineer, J. E. Reed, knew that he had dumped the ashes from said rotary on the bridge, that J. E. Reed was in charge of said rotary and had supervision over the fireman, that he had informed the engineer, J. E. Reed, that he was going to dump the ashes from the rotary on the bridge and the said J. E. Reed saw him cleaning the pan of the rotary on the bridge, that plaintiff's witness further established that it was dangerous and against the rules of the company to clean or dump the pan on the bridge, and against the rules of the defendant company to clean or dump the ashes from the rotary at any place without extinguishing *all* [329—280] fire, which rule made both the engineer and fireman equally liable, that the ashes were drawn from the rotary and the fire not extinguished as required by said rule and no evidence has been introduced by plaintiff that any other ashes and cinders were dumped upon the roadbed; that plaintiff's evidence shows that the said J. E. Reed violated the rule of dumping or cleaning the pan of his rotary on the bridge, and also the rule requiring all fire cleaned or dumped to be extinguished.

That plaintiff has failed to make out a case against the defendant.

Wherefore defendant prays that the Court direct a Verdict for this defendant.

Which motion for a Directed Verdict was by the Court denied and defendant allowed an exception to the ruling.

After argument by counsel the Court delivered his Instructions as follows:

Instructions of the Court.

Gentlemen of the Jury:

The duties of the attorneys in presenting the evidence to you have ended. Your duty to properly consider and apply under these instructions the facts established by the evidence now begins.

To assist you and at the same time perform a duty devolving alone upon the judge of this court I now proceed to state for your guidance the law applicable to the facts under the evidence in the case. The law as given you by me must be followed by you in reaching your verdict in this case.

All matters or questions of fact are for your decision [330—281] alone, as well as to the value and weight of the testimony in the case, under such rules as I shall hereinafter set out for your guidance.

This is a civil action for damages alleged to have been caused by the defendant company in the death of one J. E. Reed, the plaintiff's deceased husband.

The action is brought by deceased's wife for her benefit as well as that of the two children of the deceased and of the plaintiff.

The death of plaintiff's husband is alleged to have been caused at bridge 75A on the railway of the defendant company, by reason of a rotary on which deceased was employed by the defendant company as an engineer, leaving the rails and falling to the earth at that point.

It is undisputed that the cause of the rotary leaving the track on the said bridge 75A was the burnt condition of the ties and superstructure, leaving insufficient support to sustain the weight of the rotary.

The point for you gentlemen to decide in this case is, was the defendant company, under the law and the evidence as it has been developed in the case, responsible in this case to plaintiff and her children in damages for the death of the deceased resulting from the fall of the rotary through the bridge in question?

You are instructed that you must decide in this case the following questions:

1. Whether there was any negligence on the part of the defendant company in the cause of the death of J. E. Reed. [331—282]

2. Whether there was any negligence on the part of the defendant and also on the part of the said J. E. Reed which caused the latter's death. If so, what part of the negligence was attributable to the defendant company and what part to the deceased, Reed?

3. Was the cause of the death of Reed by the falling of a rotary of defendant through a bridge a risk that was assumed *assumed* by the deceased in his employment with the defendant company as an engineer?

4. Was the cause of the death of Reed due to the negligence alone of a fellow-servant of the deceased, Reed?

5. Was the cause of the death of Reed due to a negligence on the part of the defendant company in some duty reasonably imposed upon it, to be exercised by it in maintaining proper inspection of its road and roadbed, bridges and track, and for which duty the defendant company is liable, in the event you find by a preponderance of the evidence in the case that a duty not performed by the defendant company, through any of its officers, agents or employees, was the cause of the deceased's death?

You will understand that different instructions must be given to cover these questions just mentioned, so you must bear this connection in mind—some instructions based upon facts that warrant a verdict for the plaintiff and others which warrant a verdict for the defendant company.

You will bear all this in mind when reading and applying these instructions, and not fail to read and construe them together as one whole, instead of picking out any particular one isolated instruction, without fully understanding its connection with the rest of these instructions and basing your verdict upon it alone. [332—283]

The Act of Congress applicable to Alaska and under which this action is brought, so far as applicable to the case, provides:

“That every common carrier by railroad in the territories (and Alaska is a Territory of the

United States) shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions or in case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The Act further provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to or for the death of any of its employees, that such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

You are instructed: A railroad company is liable to the personal representative of a deceased employee, for the benefit of the widow and children, where the death of such employee was due to the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machin-

ery, track, roadbed, ways or works.

It is the duty of a railroad company to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating its trains and engines over such road; and a failure of the railroad company to exercise reasonable and ordinary care in that respect is negligence [333—284] which will render the company liable for all damages to an employee, or if killed, to his personal representative, for injuries resulting from such negligence. This duty to keep and maintain its roadbed, track and ways in safe condition is not satisfied merely by constructing it safe to begin with, but it is the duty of the company to have the track and ways watched and inspected at sufficiently reasonable intervals as to discover and repair or guard against defects arising from the operation of the road, which would endanger the lives and persons of its employees operating its trains and engines over the same, and a failure to exercise ordinary care in that respect is negligence.

If you find and believe from the evidence in this case that J. E. Reed was in the employ of the defendant as an engineer on or about January 1, 1912, and that while so employed the engine upon which he was at work was derailed and he was killed, and that the accident in which he was killed was caused by the negligence of the defendant in failing to keep its roadbed, track or ways in a reasonably safe condition, then your verdict should be for the plaintiff.

You are further instructed that the employee does not assume the risk of dangers due to the negligence of the employer, as that term will be explained to you in these instructions.

A railroad company is liable to an employee, or in the event of his death to his personal representative, for all damages for injuries caused by the negligence of any of its officers, agents or employees in performing duties of the defendant company, or failing to perform the same. And in this case, [334—285] if you find and believe from the evidence that the accident in which J. E. Reed was killed was due to, or caused by, the negligence of any officer, agent or other employee of the defendant company in that respect, you should find for the plaintiff.

If you find for the plaintiff under the instructions given you, you will determine the amount of your verdict. In arriving at this amount you will assess the damage at such sum as will compensate the plaintiff and her minor children for their pecuniary loss resulting from the death of the husband and father. In estimating this loss it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that capacity with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family, and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present

value, would be the present amount of your verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority.

You are instructed that the defendant company is a common carrier by railroad; that as such it is liable in damages to the plaintiff and her two children for the death of J. E. Reed, if such death you find resulted in whole or in part from the negligence of any of the defendant's officers, agents or employees, or by reason of any defect due to the said defendant company's negligence in its roadbed, bridge or ties or track at point of [335—286] bridge 75A on said defendant company's railroad on January 1, 1911.

You are further instructed that the defendant company would be none the less liable under the foregoing instruction for its negligence, if any, if you find that the said J. E. Reed may have been guilty of contributory negligence in causing the condition at Mile 75 which resulted in his death, but you are further instructed in this connection that if you should find that the negligence of J. E. Reed contributed to the cause of his death, the damages, if any, resulting, should be diminished in proportion to the amount of negligence attributable to the said J. E. Reed in causing his death.

You are instructed that the Act of March 4, 1907, passed by the Congress of the United States and applicable to the defendant company, its officers, agents and employees engaged in the transportation of passengers or property by railroad in the Territory of

Alaska, provided that it shall be unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employee subject to this Act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty, and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having at least eight consecutive hours off duty, provided that the provisions of this act shall not apply in any case of casualty or unavoidable accident [336—287] or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen, and provided further that the provisions of this act shall not apply to the crews of wrecking or relief trains.

You are further instructed that this Act became effective and in full force and effect on March 4, 1908.

You are further instructed that if at the time of the death of J. E. Reed the defendant company was guilty of violating the statute of the United States providing that employees of its railroad should not be employed in any one day of twenty-four hours more than sixteen consecutive hours without providing a rest of eight hours, and you further find the

breach of this law by defendant in any way contributed to the injury and death of Reed, and then if you further find under the last above hereinbefore instruction that the said J. E. Reed was guilty of contributory negligence with the defendant company in causing his death, then the said contributory negligence of the said J. E. Reed, if any, should not be considered by you in assessing the damages, if any, against the defendant company in favor of the plaintiff and her children herein.

Since the terms negligence, contributory negligence and assume risk are employed, not only in the pleadings and by the attorneys in the case, but also in the instructions, I therefore define them for your guidance in the order named.

Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the [337—288] situation, or doing what a person under existing circumstances would not have done.

Reasonable and proper care must have reference to surrounding circumstances.

You are instructed that the term contributory negligence means the want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.

You are instructed that the term “assumed risks” means that the deceased in this instance is presumed to have assumed all the risks and hazards incident

to the employment and known to him while he was engaged by the defendant company on the rotary.

You are instructed that if you find the deceased was guilty of contributing by his negligent acts in dumping or knowingly permitting his fireman to dump and leave unextinguished cinders and ashes from his rotary on the bridge in question, and that this caused the death of J. E. Reed, yet if you further find that the defendant company was subsequently and before the time the rotary fell through the said bridge on January 1, 1912, negligent in not providing through its proper agents and employees the presence of a track-walker to inspect the said road at the point in question, at bridge 75A, and you further find that such track-walker was not so engaged by said defendant company, and the presence of such track-walker would naturally have discovered the condition of the bridge in time to have prevented the accident on January 1, 1912, then the said defendant is liable, and your verdict must be for the plaintiff. [338—289]

You are instructed that if the deceased met his death alone through the negligence of his fellow-servant, the fireman on the rotary at the time, by reason of the latter having dumped the ashes from the pan of the said rotary on the bridge 75A and failed to extinguish the said ashes, and said hot ashes caused the rotary to fall through the bridge on January 1, 1912, then your verdict must be for the defendant.

You are also instructed that if the deceased met his death through any cause or risk assumed by the

deceased, then your verdict must be for the defendant.

You are instructed that if you find the defendant company was in no way negligent in its duties to its employees and to the deceased, and the injury to the said deceased occurred alone by reason of deceased's own negligence or the negligence of his fellow-servants, then your verdict must be for the defendant, unless you further find that the defendant was guilty of a violation of the labor hour laws as hereinbefore set out and such violation contributed to the injury of the deceased.

You are instructed that if the Copper River & Northwestern Railway Company had issued or posted a rule or bulletin as follows:

“Cordova, Alaska, July 16, 1910.

“TO ALL ENGINEERS, FIREMEN, HOSTLERS,
and ALL CONCERNED:—

Do not fail to extinguish all fire in ashes removed from ash-pans.

No excuse will be taken for the burning of ties or other damage to property, as a result of a failure to do this. Engineers will be held equally responsible with their firemen in [339—290] this matter.

(Signed) J. R. VAN CLEVE,
Superintendent.”

And if you find that the engineer knew that the pan of his rotary was cleaned on the bridge, and the pan dumped where he received his injury and that Engineer J. E. Reed failed, neglected or refused to extinguish or put out all the fire removed from his rotary or pan, and the fire from his rotary or the pan

was the cause of the burning of the bridge, and the unsafe condition of the roadbed was caused by the fire being dumped from the pan, you are instructed that the deceased was guilty of contributory negligence.

You are instructed that if the rules of the Copper River & Northwestern Railway Company required the engineers to extinguish all fire in ashes removed from ash-pans on his engine or rotary and the fire removed from the engine or rotary in charge of J. E. Reed was not extinguished, and this fire was the cause of the roadbed being out of repair and the ties burned and destroyed by reason of same having been dumped upon the roadbed at the point or place where deceased was injured, then you are instructed that the deceased was guilty of contributory negligence.

You are instructed that it was the duty of the deceased to be conversant, to know and obey the rules of the Copper River & Northwestern Railway Company regarding the running and operation of the rotary which he was operating.

You are instructed that if you find from the evidence the deceased knew or ought to have known that dumping the ashes and fire from his rotary on the bridge was dangerous and liable to [340—291] burn the bridge, and the bridge was burned by reason of the ash-pan from his rotary being cleaned or dumped on the bridge and was injured by reason of the burning of the bridge, you are instructed the deceased was guilty of negligence.

You are instructed that if the deceased failed to

exercise ordinary and reasonable care, which care is such as an ordinary prudent man would exercise under similar circumstances, he is guilty of contributory negligence.

You are instructed that the burden is upon the plaintiff to establish her cause of action by a preponderance of evidence, and that if the plaintiff fails to prove by a preponderance of the evidence that the defendant, Copper River & Northwestern Railway Company, was negligent as complained of in the complaint, you are instructed that the plaintiff cannot recover in this action.

You are instructed that the plaintiff alleges that the deceased, J. E. Reed, met his death by reason of defective roadbed by reason of the Copper River & Northwestern Railway Company permitting or negligently allowing ashes to be dumped on the roadbed. You are instructed that the plaintiff can only recover upon said allegations.

You are instructed that the Act for the Hours of Service Law does not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was a result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which cannot have been foreseen, nor does the Act apply to the [341—292] crews of wrecking or relief trains.

This is a civil case as distinguished from a criminal case, and is an action for damages. In a civil case it devolves upon the person who alleges affirmatively a thing to prove it by a preponderance of the

evidence. Therefore, in this case it devolves upon the plaintiff, who alleges the damages and the cause of it, to prove to you by a preponderance of the evidence the allegations contained in her complaint, which you are referred to, and which you will take with you to your jury-room. By a preponderance of the evidence I mean this, that when you take and consider all the evidence in the case, the evidence which you believe to be truthful, and all truthful evidence you should weigh carefully and consider, and one side or the other of the scales balances, that side which weighs the heavier, balances down, and is the preponderance of the evidence; therefore, if you find under the issues in this case that the evidence preponderates in favor of the plaintiff, then your verdict would be for her. If, however, you find that it weighs equally, neither side balances, then your verdict would be for the defendant, as it would be if it balanced in favor of the defendant; by reason of what I have already told you that the plaintiff has the burden of proving by a preponderance of the evidence the allegations of her complaint, if it did not preponderate for her or if it preponderates for the defendant, she loses.

Next I go to the question of testimony, how you should receive it, and how you should weigh it. While the duty devolves upon you to consider and find all questions of fact, you are not at liberty to arbitrarily disregard testimony and give undue [342—293] weight to it. You are to consider the testimony according to the rules of evidence and the

law as I shall give it to you. You should, however, in weighing the testimony in the case, give close attention and due effect to the appearance of the witness upon the stand. I mean by that, his personal demeanor, his actions, movements of hand and feet, etc., his facial expression or otherwise, or while he is in the courtroom under your inspection, as far as you are able to observe and see him. You should also take into consideration their apparent candor or otherwise to tell you the truth, the probabilities of their story, the opportunities they had of seeing or knowing the things about which they testified before you, and what is most important of all in that direction, probably, is the interest, if any, the witnesses have in the outcome of the case.

You should take all these matters into consideration and then give due and careful consideration to all the testimony which you believe to be truthful. If you believe that some witness has given testimony in some material particular of this case that is untruthful, you should disregard that entirely and give due weight to that which you believe to be truthful or is corroborated by other evidence, by other witnesses; that is to say, a witness might be untruthful about another part of it, and if he is substantiated by other witnesses on the part that is truthful, you can consider the truthful part of the testimony, otherwise you would have to disregard the witness' testimony where you find him untruthful in regard to any material point in the case. [343—294]

**[Certificate of Official Stenographer to Transcript of
Testimony, etc.]**

I hereby certify that I am the official Court Stenographer for the Third Judicial Division, Territory of Alaska; that as such Official Stenographer I reported the proceedings in the trial of the above-entitled cause, to wit, E. A. Reed, as Administratrix, etc., vs. Copper River & Northwestern Railway Co., and that the above is a full, true and correct transcript of my shorthand notes taken at said trial.

Dated at Valdez, Alaska, June 20, 1913.

ISAAC HAMBURGER. [344]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Order Allowing, Certifying and Settling Bill of
Exceptions.**

It appearing to the Court that the defendant has prepared and duly served upon attorney for the plaintiff within due time a proposed Bill of Exceptions, and said proposed Bill of Exceptions having

been delivered to the Clerk of the above-entitled court for the Judge thereof, and the Clerk having delivered said proposed Bill of Exceptions to said Judge, and said Judge of said Court having duly designated the 17 day of July, A. D. 1913, as the time at which he would settle the Bill of Exceptions, and both plaintiff's and defendant's attorneys having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 17 day of July, A. D. 1913, and both attorneys for plaintiff and defendant being present,—

IT IS THEREUPON, and is hereby ORDERED that the proposed Bill of Exceptions be allowed and the same shall be and is hereby settled and allowed as a Bill of Exceptions herein, and the same shall be presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill [345] of Exceptions conform to the truth and is in proper form, it is therefore ORDERED that the said Bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record in this cause.

Done in open Court this the 17 day of July, A. D. 1913.

FRED M. BROWN,
Judge. [346]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Court's Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions and the same has been and is approved, allowed and settled and ordered filed and made a part of the record in said cause.

Done in open court this the 17 day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy.

Filed in the District Court, District of Alaska, First Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ————, Deputy. [347]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Instructions [Requested by Defendant].

Comes now the Copper River & Northwestern Railway Company and requests the Court to make the following instructions in the above case:

I.

You are instructed that if the Rules of the Copper River & Northwestern Railway Company required the deceased to extinguish all fire in ashes removed from ash-pans of his engine or rotary, and the fire removed from the engine or rotary was not extinguished, and this fire was the cause of the roadbed being out of repair and the ties burned and destroyed by reason of same having been dumped upon the roadbed at the point or place where the deceased was injured, then you are instructed that the deceased assumed the risk of not seeing that the fire was out and cannot recover in this case.

(Refused.)

II.

You are instructed that if the Copper River &

Northwestern Railway Company's roadbed was out of repair, the ties burned and destroyed by ashes and cinders by being dumped upon the roadbed, and said deceased knew that ashes and cinders had negligently been allowed to be dumped upon the roadbed, which ashes and cinders caused the ties to be [348] burned and destroyed by ashes and the roadbed made unsafe, you are instructed that the plaintiff cannot recover in this case.

(Refused.)

III.

You are instructed that it was the duty of the deceased in this case to obey all rules and regulations of the Copper River & Northwestern Railway Company, and that if the deceased failed, neglected, or refused to obey said rules, and his injury was caused by reason of the deceased failing, neglecting or refusing to obey said rules, the deceased was guilty of contributory negligence.

(Refused.)

IV.

You are instructed that if you find from the evidence that the deceased, J. E. Reed, was engineer of the rotary, and as such engineer he has charge of the rotary, and as such engineer he is responsible for the conduct and acts of the fireman, and from the evidence you find that the fireman of the rotary dumped or cleaned the pan of the rotary on the bridge, and that this was the cause of the unsafe condition of the roadbed, then you are instructed that the deceased cannot recover in this action.

(Refused.)

V.

You are instructed that if you find from the evidence that it was the duty of the deceased to know the contents of the time-table in use on the road at the time of the accident to him, and a time-table was in use and that said time-table contained certain special rules, one of which stated where the bulletin-books are located, and it was the duty of the deceased to examine the bulletin-books, and said bulletin-books were accessible and contained a bulletin that required the deceased to extinguish all fire in ashes removed from ash-pans, and you find that deceased failed to [349] extinguish all fire removed from the ash-pan of his rotary, and that his failure to extinguish or see that it was extinguished caused the bridge to burn and make the roadbed unsafe and this was the cause of J. E. Reed's death then you are instructed that the deceased was guilty of negligence for which the defendant, Copper River & Northwestern Railway Company, cannot be held liable.

(Refused.)

You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump from his rotary the pan on the bridge, and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence.

(Refused.)

VII.

You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge, and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence and cannot recover in this action.

(Refused.)

VIII.

You are instructed that if you find from the [350] evidence that the deceased as engineer of the rotary, is responsible for the acts of the fireman and the fireman of his rotary cleaned the pan of the rotary on the bridge and it was *dangers* to clean the pan on the bridge and the bridge was made unsafe by reason of the pan having been cleaned thereon, and the deceased met his death by reason of the unsafe condition of the bridge caused by the pan being thereon, then you are instructed that the deceased was guilty of negligence and cannot recover in this action.

(Refused.)

IX.

You are instructed that if you find from the evidence that the deceased had charge of the rotary and had supervision over the fireman, and is responsible for the acts of the fireman in connection with the fire-

man's work around and upon the rotary, and you further find that the fireman of the rotary cleaned his pan on the bridge and by reason of having cleaned the pan on the bridge the bridge was made unsafe and the deceased met his death by reason of the unsafe condition of the bridge, then you are instructed that deceased cannot recover in this action.

(Refused.)

X.

You are instructed that if you find from the evidence that the deceased knew that the fireman on the rotary cleaned his pan on the bridge, which was made unsafe by reason of the fireman cleaning his pan on the bridge, and the deceased met his death by reason of the fireman cleaning his pan on the bridge and failing to extinguish all fire from the ashes of the pan cleaned on the bridge, then you are instructed that the deceased assumed all of the risks and hazards arising from or by reason of the pan being cleaned on the bridge.

(Refused.)

XI.

You are instructed that if you find from the [351] evidence that the deceased was in charge of the rotary and as such had supervision over the fireman, and that it was the deceased's duty to see that the fireman extinguished all fire in ashes removed from the ash-pan on the rotary and the deceased failed or neglected to do this, and by reason of the deceased failing to see that the fireman extinguished all fire and he met his death by reason of failure to see that the fireman extinguished all fire, then you are in-

structed that the deceased was guilty of negligence, and plaintiff cannot recover in this action.

(Refused.)

XII.

You are instructed that if you find from the evidence that the deceased's injury was caused by reason of negligence of the fireman or a fellow-servant of the deceased, that he cannot recover in this action.

(Refused.)

XIII.

You are instructed that the burden is upon the plaintiff to establish her cause of action by a preponderance of evidence, and cannot recover unless she proves by the preponderance of evidence not only that the defendant, Copper River & Northwestern Railway Company, was negligent, but must also prove that the defendant's negligence contributed to the cause of the injury to the deceased, and if she fails to establish these facts by the preponderance of the evidence, the plaintiff cannot recover.

(Refused.)

XIV.

You are instructed that it was the duty of the deceased, J. E. Reed, to be conversant with the rules of the Copper River & Northwestern Railway Company pertaining to the running and operating of the rotary, including rules regarding the extinguishing of fire from the ash-pan of his rotary.

(Refused.) [352]

XV.

You are instructed that if you find from the evidence that the deceased, J. E. Reed, disobeyed any

rule of the Copper River & Northwestern Railway Company and he was injured or killed by reason of his disobeying said rule or rules, you are instructed that the plaintiff cannot recover in this action.

(Refused.)

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 3, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [353]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Motion for Directed Verdict.

Comes now the defendant and moves the Court for a DIRECTED VERDICT in this action for the following reasons:

I.

Because plaintiff bases her cause of action upon the negligence of the defendant, which negligence consisted in the “Defendant allowing its road-bed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.”

That the plaintiff's witnesses have admitted and established that the fireman on the rotary dumped the ashes from the rotary on the roadbed, which witness also admitted that the engineer, J. E. Reed, knew that he had dumped the ashes from said rotary on the bridge, that J. E. Reed, was in charge of said rotary and had supervision over the fireman, that he had informed the engineer, J. E. Reed, that he was going to dump the ashes from the rotary on the bridge and the said J. E. Reed saw him cleaning the pan of the rotary on the bridge, that plaintiff's witness further established that it was dangerous and against the rules of the company to clean or dump the pan on the bridge, and against the rules of the defendant company to clean or dump the ashes from the rotary at any place without extinguishing *all* fire, which rule made both the [354] engineer and fireman equally liable, that the ashes were drawn from the rotary and the fire not extinguished as required by said rule and no evidence has been introduced by plaintiff that any other ashes and cinders were dumped upon the roadbed; that plaintiff's evidence shows that the said J. E. Reed violated the rule of dumping or cleaning the pan of his rotary on the bridge, and also the rule requiring all fire cleaned or dumped to be extinguished.

That plaintiff has failed to make out a case against the defendant.

Wherefore defendant prays that the Court direct a verdict for this defendant.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 3, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [355]
[356]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of J.
E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

**Defendant's Exceptions to Court's Instructions to
Jury and Formation of Jury.**

This cause having come on to be heard on the 30th day of April, A. D. 1913, and it having been submitted to the jury on the 3d day of May, A. D. 1913, and it having been stipulated between the attorneys for the plaintiff and defendant in the presence of the jury, and before it had retired, and in the presence of the Court, that the plaintiff and defendant have until and including the 5th day of May, A. D. 1913, to make exceptions to Instructions given and refused and to the trial of said cause.

Now, on this the 5th day of May, A. D. 1913, the defendant makes the following exceptions:

I.

Excepts to the formation and selection of the jury

in this case for the reason that a regular jury, as provided by law, was drawn for this special term of court to be held at Cordova, Alaska, beginning April 10, 1913, at which time and place a full panel did not report and thereafter on the —— day of April, A. D. 1913, a first special venire was issued according to law and the persons selected and summoned by reason of said first special venire reported to serve as jurors, and that thereafter on the —— day of April, A. D. 1913, a second special venire was issued, which said second venire demanded and required that the names be [357] selected and limited to Seward, Alaska and Valdez, Alaska; that thereafter the first special venire was discharged from further jury duty; that in selecting the names for the jurors in this case the names of the regular jurors who reported for this term of court together with names of the persons selected from by the second special venire from Valdez and Seward, were placed in the jury-box, and that the names of the persons selected and summoned on the first special venire, who had been discharged, were not placed in the jury-box with the aforesaid named jurors, and that the defendant was required to go to trial with the aforesaid jurors against its will and exceptions to said jury; that the formation of said jury for this trial was contrary to law.

II.

That certain jurors selected in this case admitted that they had served as jurors at regular term of court held in this Division as special veniremen within one year, that defendant challenged said jurors for cause, which challenge was refused by the

Court and exception taken and allowed, and that the defendant was required to and did use its peremptory challenge on said jurors and exhausted his peremptory challenges.

III.

That in the formation of the jury for this case a part of the panel selected out of the original panel, excepting the first special venire, were out deliberating on another case; that the names in the jury-box were exhausted and court adjourned until the return of the jurymen who were out deliberating on another case, at which time defendant was required to have a part of said jurymen used in connection with this case, and that the Court refused to select or complete said jury for this case from the bystanders or body of the District as many qualified persons as was necessary to complete the jury, to which an exception was taken and upon the return of said jury, which had been out deliberating, the jury for this case was completed [358] from such jurymen.

IV.

Defendant excepts to instructions given on page 3, which states as follows: "Was the cause of the death of Reed due to a negligence on the part of the defendant company in some duty reasonably imposed upon it, to be exercised by it in maintaining proper inspection of its road and roadbed, bridges and track and for which duty the defendant company is liable." Defendant excepts to that portion of this instruction, for the reason that there was no evidence introduced in the case showing that it was necessary to maintain

proper inspection of its road and roadbed, bridges and track.

V.

Defendant excepts to the second instruction on page 5, which is as follows: "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to or for the death of any of its employees, that such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," for the reason that said instruction is not applicable to the issues raised in the pleadings in this case. That no allegation is made by charging negligence regarding the safety of employees as provided for in this instruction.

VI.

Defendant excepts to instruction given on page 6, for the reason that said instruction is contrary to the law and not applicable to the facts of negligence alleged in plaintiff's complaint, and for the further reason that said instruction required the defendant to have the track and ways watched and inspected so as to discover and guard against defects arising from the operating of the road by reason of violation of rules promulgated to keep said roadbed and track in good repair. [359]

VII.

Defendant excepts to instruction given on page 7

regarding damages, for the reason that the same is contrary to law and not the proper basis for forming damages in this case.

VIII.

Defendants excepts to instruction given on page 8, for the reason that said instruction fixes liability upon the defendant if the said J. E. Reed's death resulted in whole or in part from the negligence of the defendant's officers, agents or employees.

IX.

Defendant excepts to instruction on page 9, for the reason that it is confusing.

X.

Defendant excepts to instruction given on page 10, regarding the hour of service of employees, for the reason that this action against the defendant does not allege and it was not in issue that the defendant had been negligent in working or permitting said men to work contrary to the law, and it is not shown or claimed that the employment of men for a longer period or hours otherwise to or in any manner had anything to do with the cause of the accident.

XI.

Defendant excepts to instruction given on page 11, for the reason that said instruction is contrary to law, and there is no allegation in the complaint that the defendant was violating any statute of the United States regarding employees' employment, and not alleged in the complaint that the accident to said J. E. Reed was due or in any way caused by the defendant violating the statute of the United States

providing that employees should not be employed in any one day of twenty-four hours more than sixteen hours without providing a rest of eight hours.

XII.

Defendant excepts to instruction of page 13 [360] regarding track-walker, for the reason that the complaint does not allege that the defendant was negligent in keeping a track-walker or having a track-walker or that said injury or accident was caused by reason of not having a track-walker, and for the further reason that it was not established that a track-walker was necessary, and for the further reason that it was not shown that a track-walker would have seen or prevented the accident or would have obeyed the rules and bulletins of the Company, and for the further reason that the law does not require an employee to keep and employ a person for the purpose of seeing that an engineer or fireman disobey regulations known to him for his own safety and for the further reason that said instruction is contrary to law.

XIII.

Defendant excepts to instruction given on page 16, for the reason that said instruction provides that if the defendant was guilty of a violation of the labor hour law as before set out, that the hour of service law was not put in issue in this case and there is no allegation or proof that the violation of said law caused or contributed to said injury.

XIV.

Defendant excepts to the refusal of the Court to

give third instruction requested by the defendant on page 3.

XV.

Defendant excepts to the refusal of the Court to give fourth instruction requested by the defendant on page 4.

XVI.

Defendant excepts to the refusal of the Court to give fifth instruction requested by the defendant on page 5.

XVII.

Defendant excepts to the refusal of the Court to give seventh instruction requested by the defendant on page 7.

XVIII.

Defendant excepts to the refusal of the Court to [361] give ninth instruction requested by the defendant on page 9.

XIX.

Defendant excepts to the refusal of the Court to give tenth instruction requested by the defendant on page 10.

XX.

Defendant excepts to the refusal of the Court to give eleventh instruction requested by the defendant on page 11.

XXI.

Defendant excepts to the refusal of the Court to give twelfth instruction requested by the defendant on page 12.

XXII.

Defendant excepts to the refusal of the Court to

give thirteenth instruction requested by the defendant on page 13.

XXIII.

Defendant excepts to the refusal of the Court to give fourteenth instruction requested by the defendant on page 14.

XXIV.

Defendant excepts to the refusal of the Court to give fifteenth instruction requested by the defendant on page 15.

XXV.

Defendant excepts to the refusal of the Court to give sixteenth instruction requested by the defendant on page 16.

XXVI.

Defendant excepts to the refusal of the Court to give nineteenth instruction requested by the defendant on page 19.

XXVII.

Defendant excepts to the refusal of the Court to give twenty-first instruction requested by the defendant on page 21.

XXVIII.

Defendant excepts to the refusal of the Court to give twenty-second instruction requested by the defendant on page 22.

R. J. BORYER,

Attorney for Defendant. [362]

Exceptions allowed.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [363]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Motion for Judgment Notwithstanding Verdict.

Comes now the defendant, by its attorney R. J. Boryer, and moves the Court to enter judgment in this case in favor of the defendant and against the plaintiff notwithstanding the Verdict returned in said cause for the following reasons:

I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

A. That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

B. In that plaintiff based her cause of action because on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes

and cinders negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed. That the plaintiff had agreed and stated that the words "and otherwise suffered to become utterly unsafe and unfit as a roadbed" applied to said ties being burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.

C. That the plaintiff's witnesses admitted that on the night of December 30, 1911, the plaintiff's deceased husband [364] was in charge of and had control over Rotary X1; that the fireman of this rotary was under the supervision and instructions of the deceased husband, who was engineer and had charge of said Rotary; that the fireman of this rotary, against the rules and orders of the defendant company, cleaned or dumped the ash-pan of his rotary on bridge 75A, which bridge was destroyed by fire by reason of the ashes being dumped from said rotary on the day of January 1, 1912; that the plaintiff's deceased husband was killed by reason of the fire of said bridge caused by reason of the ash-pan of said rotary being dumped or cleaned on said bridge, which act was against a known rule of the company, and the further known rule that required the plaintiff's deceased husband to extinguish all fire from ashes removed from ash-pan at any and all places.

II.

A. That plaintiff's witnesses admitted that they

left Cordova on the 30th day of December, 1911, the first terminal of the Copper River & Northwestern Railway Company, or the defendant, and that the second or next terminal of defendant company is located at Tiekel or Mile 101 beyond a point where Bridge 75A is located; that said bridge being located on Mile 75 and being between the terminal at Cordova and Tiekel.

B. That the plaintiff's evidence shows conclusively that the reason they were delayed and required to be on duty from the time they left Cordova until they reached Tiekel was because that the rotary that they started from Cordova with met with an accident, which necessitated repairing said rotary and returning it to Cordova, and that they were required to await the arrival of another rotary from Cordova, and that during all of the time between said terminals they were on a single track and were fighting snow, and that it was dangerous to stop said rotary while fighting snow, for the reason that a snow or wind would possibly snow them in and delay them for an indefinite time; that said railroad of the defendant is a single track from Cordova, its first terminal and Tiekel its second terminal. That the acts which required said [365] employees to be on duty for the time that they were on duty was caused by casualties and unavoidable accidents and the act of God, and could not have been foreseen by the defendant, and that said delay was not the result of a cause known to the carrier or its officers, agents in charge of said employees at the time said employees

left the first terminal nor which could have been foreseen by the defendant.

C. That the plaintiff's witness, Albright, who cleaned the ash-pan on the bridge, which fire caused the bridge to burn that caused the death of plaintiff's husband, admitted that the reason he violated the rule of cleaning his fire on the bridge and the further rule of seeing that all fire from ashes removed from ash-pan is extinguished, was because they wished to save time, and for the further reason that if he cleaned the pan off of the bridge he would have been required to shovel some snow from the side of the track so that he could use his hoe for the purpose of cleaning out his pan.

III.

That Bridge 75A was shown to be a safe bridge from the evidence, for the reason that this rotary with its engines, on the night before the accident to the plaintiff's deceased husband, had crossed this bridge several times; that there was not any evidence in this case to show that a track-walker or sectionman is necessary over that particular portion of the road, nor does the law require that the defendant keep a track-walker or sectionman for the purpose of seeing that engineers or trainmen obey rules and orders.

IV.

That the Verdict is against the evidence and law.

Wherefore, defendant prays for Judgment Notwithstanding Verdict.

R. J. BORYER,
Attorney for Defendant. [366]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [367]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RY. CO.,
a Corp.,

Defendant.

**Order Denying Motion for Judgment Notwithstanding
Verdict.**

Coming on to be heard upon defendant's motion for a judgment notwithstanding verdict, J. H. Cobb appearing for plaintiff and against said motion; R. J. Boryer appearing for defendant and for said motion, and the Court being fully advised in the premises,

IT IS ORDERED that said motion for a judgment notwithstanding verdict be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

Entered Court Journal No. C.-2, page No. 81.

Special April, 1913, Term May 5th—22d Court
Day—Monday. [368]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,

Defendant.

Motion for New Trial.

Comes now the defendant, by its attorney, R. J. Boryer, and moves the Court that if the Court denies the motion of the defendant to set aside the Verdict in this case and enter Judgment for the defendant, that the Court vacate the Verdict found by the jury in this action returned on the 3d day of May, A. D. 1913, and grant the defendant a new trial of this action, for the following reasons which materially affect its substantial rights, to wit:

I.

Insufficiency of evidence to sustain or justify the verdict in the following particulars:

A. That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

B. In that plaintiff based her cause of action because on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes

and cinders negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed. That the plaintiff had agreed and stated that the words "and otherwise suffered to become utterly unsafe and unfit as a roadbed" applied to said ties being [369] burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.

C. That the plaintiff's witnesses admitted that on the night of December 30th, 1911, the plaintiff's deceased husband was in charge of and had charge over Rotary X1; that the fireman of this rotary was under the supervision and instructions of the deceased husband who was engineer and had charge of said rotary; that the fireman of this rotary against the rules and orders of the defendant company cleaned or dumped the ash-pan of his rotary on bridge 75A, which bridge was destroyed by fire by reason of the ashes being dumped from said rotary on the day of January 1, 1912; that the plaintiff's deceased husband was killed by reason of the fire of said bridge caused by reason of the ash-pan of said rotary being dumped or cleaned on said bridge, which act was against a known rule of the company, and the further known rule that required the plaintiff's deceased husband to extinguish all fire from ashes removed from ash-pan at any and all places.

II.

A. That plaintiff's witnesses admitted that they left Cordova on the 30th day of December, 1911, the first terminal of the Copper River & Northwestern

Railway Company, or the defendant, and that the second or next terminal of defendant company is located at Tiekel, or Mile 101, beyond a point where Bridge 75A is located; that said bridge being located on Mile 75 and being between the terminal at Cordova and Tiekel.

B. That the plaintiff's evidence shows conclusively that the reason they were delayed and required to be on duty from the time they left Cordova until they reached Tiekel was because that the rotary that they started from Cordova with met with an accident, which necessitated repairing said rotary and returning it to Cordova, and that they were required to await the arrival of another rotary from Cordova, and that during all of the time [370] between said terminals they were on a single track and were fighting snow, and that it was dangerous to stop said rotary while fighting snow, for the reason that a snow or wind would possibly snow them in and delay them for an indefinite time; that said railroad of the defendant is a single track from Cordova, its first terminal, and Tiekel its second terminal. That the acts which required said employees to be on duty for the time that they were on duty was caused by casualties and unavoidable accidents and the act of God, and could not have been foreseen by the defendant, and that said delay was not the result of a cause known to the carrier or its officers, agents in charge of said employees at the time said employees left the first terminal nor which could have been foreseen by the defendant.

C. That the plaintiff's witness Albright, who

cleaned the ash-pan on the bridge, which fire caused the bridge to burn that caused the death of plaintiff's husband, admitted that the reason he violated the rule of cleaning his fire on the bridge and the further rule of seeing that all fire from ashes removed from ash-pan is extinguished, was because they wished to save time, and for the further reason that if he cleaned the pan off of the bridge he would have been required to shovel some snow from the side of the track, so that he could use his hoe for the purpose of cleaning out his pan.

III.

That bridge 75A was shown to be a safe bridge from the evidence, for the reason that this rotaary with its engines on the night before the accident to the plaintiff's deceased husband had crossed this bridge several times; that there was not any evidence in this case to show that a track-walker or section-man is necessary over that particular portion of the road, nor does the law require that the defendant keep a track-walker or sectionman for the purpose of seeing that engineers or trainmen obey rules and orders.

IV.

That the Verdict is against the evidence and law.
[371]

V.

That the amount of damages allowed in this case is excessive and was influenced by passion or prejudice.

VI.

Errors of law occurring in the trial and exceptions

made by the defendant.

VII.

Accident or surprise by which ordinary prudence could not have guarded against.

VIII.

In denying defendant's Motion for a Directed Verdict.

IX.

That the plaintiff bases the accident upon the following negligence as alleged in her complaint in paragraph 3, which is as follows: "That on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed," it being rules by this Court on a Motion to Make More Definite and Certain and being agreed by attorney for the plaintiff that the following words "And otherwise suffered to become utterly unsafe and unfit as a roadbed" referred to ashes and cinders being negligently dumped upon the roadbed. That the plaintiff, against the objections of the defendant and exceptions taken, introduced in evidence matters relating to track-walkers and hours of work performed by the crews on the rotary and other engines pushing the rotary and the train crews on the local train, of the trip of said rotary and trains from the time they left Cordova terminal on the 30th day of December, 1911, up until the night of the accident, January 1, 1912. That the pleadings and issues as made up in

this case do not allege or in any way [372] refer to such facts as would permit the defendant to anticipate that such evidence would be brought out or introduced, or that the plaintiff was basing her cause of action partly on such acts and facts.

X.

For the further reason that the instructions given on page 3 require that the jury consider whether J. E. Reed met his death by reason of the negligence of the defendant company in failing to maintain and inspect its road, and roadbed, bridges and track, that the law does not require the defendant to maintain and keep inspectors of roadbed, bridges, and track until it has been shown by the plaintiff that such was necessary, and in no event does the law require the defendant to keep inspectors for the purpose of inspecting roadbed and bridges for the safety of one who violates a rule, and by violating said rule makes the roadbed or bridge unsafe.

XI.

For the further reason that the Court, on page 5 of its Instructions, instructed the jury that in any action brought against any common carrier under or by virtue of any of the provisions of the Act referred to on said page, to recover damages for injuries to or for the death of any of its employees, that such employees shall not be held to have assumed the risks of his employment, in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

That there are no allegations in the complaint and

no evidence in the case to the effect that the said J. E. Reed met his death by reason of the defendant violating any statute enacted for the safety of employees which [373] contributed to the injury or death of the said J. E. Reed, and for the further reason that it was shown by the evidence that all work performed by the said J. E. Reed and other employees of the rotary crew and train crews was performed on a single-track railway between Cordova, their starting terminal, and the next terminal at Tiekel or Mile 101, and that the cause of the death of J. E. Reed was the burning of the Bridge 75A, on Mile 75, the fire of which was caused by the deceased permitting his fireman to clean his rotary pan on this bridge, and for the further reason that he did not require or did not put out or extinguish all fire from ashes dumped from this pan onto the bridge, which is contrary to the rules of the company, and plaintiff's evidence shows that the reason he dumped or cleaned his pan on this bridge was because he wished to save time and so he would not be required to shovel some snow from the side of the track where he could stand so as to pull his fire.

Wherefore, defendant requests that a New Trial be granted in this action.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [374]

*In the District Court for the Territory of Alaska,
Third Division.*

SPECIAL APRIL, 1913, TERM—MAY 5TH—
22D COURT DAY—MONDAY.

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO., a Corporation,

Defendant.

Order Denying Motion for New Trial.

Coming on to be heard upon defendant's motion for a new trial, filed in the above-entitled cause; J. H. Cobb appearing for plaintiff and against said motion; R. J. Boryer appearing for defendant and for said motion, and after arguments had and the Court being fully advised in the premises,

IT IS ORDERED that said motion for a new trial be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is duly allowed.

Entered Court Journal No. C.-2, page No. 82.

[375]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Admx. of the Estate of J. E.
REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendant and assess plaintiff's damages at Twenty Thousand Dollars (\$20,000.00).

Dated at Cordova, Alaska, this May 3d, 1913, *day of May, A. D. 1913.*

E. F. BELL,
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 3, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. C.—2, page No. 74.
[376]

*In the District Court for Alaska, Third Division, at
Cordova.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on regularly to be heard, and thereupon came the plaintiff, by her attorney, Mr. J. H. Cobb, and announced ready for trial; came also the defendant by its attorney, Mr. R. J. Boryer, and likewise announced ready; and thereupon came a jury of good and lawful men, to wit, E. F. Bell, and eleven others, who having been duly tried, selected, impaneled and sworn, and having heard the evidence, the argument of counsel and the instructions of the Court, retired in charge of a bailiff to consider of their verdict; and after due deliberation had, returned into open court the following verdict, to wit:

C.—50.

Mrs. E. A. REED, as Admx. of the Estate of J. E.
REED, Decd.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

VERDICT.

We the jury, selected, impaneled, sworn and charged in the above-entitled cause, do find for the plaintiff and against [377] the defendant, and assess the plaintiff's damages at Twenty Thousand (\$20,000) Dollars.

Dated at Cordova, Alaska, this May 3d, 1913, *day of May A. D. 1913.*

Signed—E. F. BELL,
Foreman.

—which said verdict was by the Court received and ordered filed. And the defendant's motion for a new trial having been heretofore overruled and denied, now, on motion of Mr. Cobb, for the plaintiff, for judgment upon the verdict,

It is considered by the Court, and so ordered and adjudged, that the plaintiff, Mrs. E. A. Reed, as administratrix of the estate of J. E. Reed, Decd., do have and recover of and from the defendant, the Copper River & Northwestern Railway Company, a corporation, the sum of Twenty Thousand Dollars (\$20,000), with interest thereon from the date hereof at the rate of 8 per cent per annum, and all costs and disbursements herein incurred, and taxed at the sum of \$340.00, *Dollars*, for all of which let execution issue.

Done in open court this the 6th day of May, 1913.

· PETER D. OVERFIELD,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. C.—2, page No. 85.
[378]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Order Fixing Time to File and Present Bill of
Exceptions and Granting Stay.**

Coming on to be heard upon motion of R. J. Boryer for an order of the Court, fixing the time to file and present defendant's bill of exceptions in the above-entitled cause, and for a stay of execution; J. H. Cobb appearing for plaintiff and R. J. Boryer appearing for the defendant, and the Court being fully advised in the premises,

IT IS ORDERED that defendant be granted 60 days to file and present its bill of exceptions in the above-entitled cause, and

IT IS FURTHER ORDERED that a stay of execution be had for said period.

Special April, 1913, Term—May 5th—22d Court Day—Monday.

Entered Court Journal No. C.—2, page No. 82.
[379]

*In the District Court for Alaska, Division No. Three,
at Cordova.*

No. C.—50.

Mrs. E. A. REED, as Administratrix, etc.,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY CO.,

Defendants.

**Stipulation [Extending Time to August 1, 1913, to
Settle Bill of Exceptions].**

It is hereby stipulated that the time for settling the Bill of Exceptions herein may be extended to, and inclusive of August 1st, 1913, and execution shall not issue prior to said date.

Dated June 30th, 1913.

J. H. COBB,

Attorney for Plaintiff.

R. J. BORYER,

Per JNO. W. WINN,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. July 17, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. July 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [380]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Comes now the Copper River & Northwestern Railway Company, a corporation, the defendant herein, and complains and stated that on the 6th day of May, A. D. 1913, the above-entitled Court entered judgment herein in favor of the plaintiff above named, and against the defendant above named, in which judgment, and in the proceedings had prior thereto in the above-entitled cause, certain errors were committed to the prejudice of this defendant, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing the amount of bond for a supersedeas in said cause.

Dated this the 17th day of July, A. D. 1913.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [381]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

On this day came the defendant, the Copper River & Northwestern Railway Company, a corporation, by its attorney, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things con-

cerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

Dated this the 17th day of July, A. D. 1913.

FRED M. BROWN,

Judge for the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 18, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [382]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—50.

Mrs. E. A. REED, Administratrix of the Estate of
J. E. REED,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that the Copper River and Northwestern Railway
Company, a corporation, defendant in the above-

entitled action, as principal, and American Surety Company, of New York, a corporation organized and existing under the laws of the State of New York, duly authorized to do business in Alaska and to sign bonds as surety therein as surety, are held and firmly bound unto Mrs. E. A. Reed, as administratrix of the estate of J. E. Reed, plaintiff and defendant in error in the above-entitled cause, in the penal sum of Twenty-five Thousand Dollars, lawful money of the United States of America, to be paid to the said Mrs. E. A. Reed, as administratrix of the estate of J. E. Reed, her successors or assigns, her executors and administrators, for which payment well and truly to be made, we bind ourselves and each of us, and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 11th day of July, A. D. 1913.

The condition of the foregoing obligation is such that

WHEREAS, the said Copper River & Northwestern Railway Company, a corporation, defendant in said cause, as the above-named principal obligator, is suing out a Writ of [383] Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause entered May 6th, 1913, by the Circuit Court of the United States for the District Court for the District and Territory of Alaska, Third Division, in favor of said plaintiff for and against said defendant, for the sum of Twenty Thousand (\$20,000.00) Dollars and costs.

WHEREAS, the said principal obligator desires to give good and sufficient security in accordance with the statute in such cases made and provided for, all costs and damages to be occasioned by said Writ of Error and to operate as a supersedeas upon such judgment and stay the execution thereof pending the hearing and decision of said Circuit Court of Appeals upon said Writ of Error.

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal obligator, defendant in said cause, shall prosecute said Writ of Error to effect, and if it fail to make good its plea, shall answer all damages, interest and costs, then this obligation shall be void; otherwise to remain in full force and effect.

COPPER RIVER & NORTHWESTERN
RY. CO.

By R. W. BAXTER,

Vice-Prest.

AMERICAN SURETY COMPANY OF
NEW YORK,

[Seal]

By EDWARD J. LYONS,

Resident Vice-President.

By S. H. MELROSE,

Resident Assistant Secretary.

Approved as a cost bond July 18, 1913.

FRED M. BROWN,

District Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 18, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [384]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Writ of Error [Copy].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third
Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between Mrs. E. A. Reed, as administratrix of
the estate of J. E. Reed, deceased, the original plain-
tiff and the defendant in error, and the Copper River
& Northwestern Railway Company, the original
defendant and the plaintiff in error, manifest error
hath happened to the damage of said the Copper
River & Northwestern Railway Company, plaintiff
in error, as by its answer appears, we being willing

that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said circuit, on the 16th day of August, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein [385] to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory and
District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,

Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Writ of Error received and service acknowledged this the 17th day of July, A. D. 1913.

J. H. COBB,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [386]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Writ of Error [Original].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third
Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between Mrs. E. A. Reed, as administratrix of
the estate of J. E. Reed, deceased, the original plain-
tiff and the defendant in error, and the Copper River
& Northwestern Railway Company, the original
defendant and the plaintiff in error, manifest error

hath happened to the damage of said the Copper River & Northwestern Railway Company, plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 16th day of August, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein [387] to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17 day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory and
District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Terri-
tory and District of Alaska, Third Division.

Copy of this Writ of Error received and service acknowledged this the 17th day of July, A. D. 1913.

J. H. COBB,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 17, 1913. E. A. Pettit, Clerk. By ————. Deputy. [388]

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [389]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Citation [on Writ of Error (Copy)].

United States of America.

The President of the United States to Mrs. E. A.
Reed, as Administratrix of the Estate of J. E.
Reed, Deceased, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California,

within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 17 day of July, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and District of Alaska, Third Division. [390]

Copy of this Citation received and service acknowledged this the 17th day of July, A. D. 1913.

J. H. COBB,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [391]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Original)].

United States of America.

The President of the United States to Mrs. E. A.
Reed, as Administratrix of the Estate of J. E.
Reed, Deceased, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said Court in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 17 day of July, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and District of Alaska, Third Division. [392]

Copy of this Citation received and service acknowledged this the 17th day of July, A. D. 1913.

J. H. COBB,

Attorney for Defendant in Error. [393]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [394]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

1.

The Court erred in overruling plaintiff in error's challenge to Juror Adam Swan, to which ruling plaintiff in error duly excepted and its exception allowed:

"Q. (Mr. BORYER.) I will ask you if you served as a juror within the last year in this Court or in this Division."

"A. I served—not as a trial juror, no."

"Q. What did you serve as?"

"A. I served on the special venire of the Grand Jury in Valdez last fall."

"Q. In this court?"

"A. The court was then in Valdez."

By the COURT.—The record will show.

"Q. In this division?"

"A. In this division."

Mr. BORYER.—I submit a challenge.

Mr. COBB.—We resist the challenge.

The COURT.—The challenge is overruled. To which ruling of [395] the Court defendant is allowed an exception.

2.

The Court erred in permitting defendant in error to question the Juror W. C. McCall regarding the ownership of the Copper River & Northwestern

Railway Company and the mine at Latouche, to which plaintiff in error excepted and exception was allowed. The proceedings being as follows:

“Q. (Mr. COBB.) Are you in the employ of the mine at Latouche?” “A. Yes, sir.”

“Q. You know, do you not, that the Copper River & Northwestern Railway Company and that mine are owned by the same people or practically the same people?”

“A. I have heard so.”

“Q. That is generally understood, is it not?”

Mr. BORYER.—That is just the point I raised a moment ago. I object to the question for the reason that I was not permitted to introduce the identical same question.

The COURT.—You may answer the question.

Exception taken and allowed.

“Q. Would that fact influence you in any way in arriving at a verdict in this case?”

“A. It would not.”

3.

The Court erred in declaring recess or adjournment of Court after some of the jurors had been called to await the return of other jurors on other cases and the panel exhausted to which plaintiff in error excepted and exception was allowed. Proceedings of which were as follows:

“The panel having become exhausted, with a jury out considering another case—

By the COURT.—Unless the attorneys agree to go on with the jurors we have, I think I will take a recess until the other jurors come in.

Mr. BORYER.—I prefer that we have a full jury.

By the COURT.—The jurors who are now in the box will occupy the same position as though you may ultimately be chosen as far as conversation regarding [396] this case is concerned with anybody and if it should happen that other jury should come in by 4 o'clock, I would like to have you return into Court and we will take it up this afternoon; if they do not we will continue to-morrow morning, but we will adjourn tentatively until 4 o'clock this afternoon.

Mr. BORYER.—I want to take an exception—the defendant excepts to the Court's ruling in excusing the jury, for the reason that the law provides that when the panel is exhausted, that the panel shall be filled from the bystanders and that this was not done, in that the jury was excused for the purpose of awaiting the return of another jury that was then considering another case, and such jury would not be from the bystanders as required by law.

Exception allowed."

4.

The Court erred in permitting plaintiff to introduce in evidence certified copy of order appointing plaintiff administratrix of the estate of J. E. Reed, deceased, and letters of administration, to which defendant excepted and exception was allowed--which proceedings were as follows:

Mr. COBB.—“Plaintiff first offers in evi-

dence a certified copy of the order appointing the plaintiff administratrix of the estate of J. E. Reed, deceased."

Mr. BORYER.—"We desire to object, for the reason that the order is not accompanied by the petition and other papers upon which the order is based and for the further reason that this is not the proper manner of showing the appointment of an administratrix."

By the COURT.—"In what respect?"

Mr. BORYER.—"That the records themselves should be shown here."

Objection overruled. Defendant allowed an exception.

The certified copy of order appointing the plaintiff administratrix of the estate of J. E. Reed, deceased, is marked Plaintiff's Exhibit "A," is attached hereto and made a part hereof.

Mr. COBB.—"We next offer in evidence a certified copy from the same Probate Court of letters of administration."

Mr. BORYER.—"To which we make the same objection."

Objection overruled. Defendant allowed an exception.

Letters of administration marked Plaintiff's Exhibit "B" and attached and made a part hereof.
[397]

5.

The Court erred in permitting the witness O. L. Larson to testify regarding the leaving, running and operating of the train from Cordova over the

line of the Copper River & Northwestern Railway Company on the 31st day of December, 1911, and in overruling the objection of the plaintiff in error to said testimony, to which plaintiff in error excepted and exception allowed, which proceedings were as follows:

“Q. (Mr. COBB.) Do you recall a train leaving here, that is, the town of Cordova, to go out over the line of the Copper River & Northwestern Railway on the 31st day of December, 1911?” “A. Yes, sir.”

“Mr. BORYER.—I ask the answer be withdrawn—it was answered before I could object. I desire to object to the question for the reason that it is immaterial and irrelevant and not pertinent to the issues in the case. This accident is alleged to have occurred at Mile 75A and it is immaterial as to the operation or running of that train from Cordova up to that point under the issues of the case.”

“By the COURT.—I have no objection to the question. The objection will be overruled.”

Defendant allowed an exception.

“A. Yes, sir.”

“Q. Have you any memorandum made at the time of the time that train left?”

“A. Yes, sir.

“Q. Referring to that and refreshing your memory tell the jury what time the train went out from here?”

“A. The train left here on the 30th of December at one o'clock P. M.”

“Q. Now, what made up that train?”

“A. The train I had was—I don’t just know how many cars, I will look and see (referring to memorandum-book). There was six cars in that train besides the engine.”

“Q. What was the first engine?”

“A. Engine #102 I believe; next to the engine was a box-car and then a gondola flat car; following that was two box-cars and a coach on the rear.”

6.

The Court erred in permitting the witness O. L. Larson to testify [398] regarding the crews on the trains had been continuously on service, on duty from the time they left Cordova up to the day following the time they left Cordova, and in overruling the objection of plaintiff in error to said testimony, to which plaintiff in error excepted and exception was allowed, which proceedings were as follows:

“Q. (Mr. COBB.) State whether or not the crews on those trains had been continuously on service, on duty, from the time they left here up to that hour.”

Mr. BORYER.—“I desire to interpose an objection for the reason that it is incompetent, irrelevant and immaterial and it is not pertinent to the issues in the case.”

By the COURT.—“For what reason?”

Mr. BORYER.—“For the reason that it has nothing to do with the issues in the case,—it tends to prove nothing as to the issues raised in the pleadings.”

By the COURT.—“You probably understand, without going into details, the statute referred to by Mr. Cobb in his statement.”

Mr. BORYER.—“I understand the statute but I desire to make the objection.”

By the COURT.—“If that is all you wish to say about the objection it will be overruled and exception allowed.”

7.

The Court erred in permitting witness O. L. Larson to testify regarding section-house at 78 and taking anybody aboard and in overruling plaintiff in error exception taken and allowed, which proceedings were as follows:

“Q. (Mr. COBB.) When you left there state if you took anybody aboard.”

Mr. BORYER.—“We object to that as irrelevant and immaterial and tends to prove nothing under the issues and pleadings.”

Objection overruled. Defendant allowed an exception.

“A. I don’t remember whether they took anybody aboard the rotary or not—I don’t remember picking up anybody myself on the train.”

“Q. You don’t remember?” “A. No.”

8.

The Court erred in permitting witness Henry Lee to testify relative to train crews and rotary crews being continuously on duty since [399] leaving Cordova and overruling of exception of plaintiff in error, which was duly excepted to and exception allowed, which testimony was as follows:

“Q. (Mr. COBB.) Now, tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova?” “A. Yes, sir.”

Mr. BORYER.—“I object to that—make the same objection.”

Objection overruled. Defendant allowed an exception.

9.

The Court erred in permitting witness Henry Lee to testify relative to section-men and overruling exception of plaintiff in error, which was duly excepted to and exception allowed, which testimony was as follows:

“Q. (Mr. COBB.) And you left this bridge—did you see any section-men around?”

Mr. BORYER.—“We object to that as incompetent, irrelevant and immaterial and does not tend to prove anything along the issues of the case.”

Objection overruled. Defendant allowed an exception.

“Q. (Mr. COBB.) Did you see any section-men around?”

“A. I did—at the time we were there, not when we were leaving.”

“Q. At the time you were there you saw some?” “A. Yes, sir.”

“Q. You didn’t see any when you were leaving?” “A. No.”

“Q. You don’t know whether they remained there or not?” “A. No, I do not.”

10.

The Court erred in permitting witness Henry Lee in testifying relative to cleaning of pan on bridge, in overruling objection of plaintiff in error to said testimony duly excepted and exception allowed, which testimony [400] was as follows:

“Q. (Mr. COBB.) Would there have been any difficulty or any reason that you know of in cleaning out those engines at any other place at that time except on the trestle?”

Mr. BORYER.—“We object to the question as calling for a conclusion, irrelevant and immaterial and does not tend to prove anything as to the fire at that particular point.”

Mr. COBB.—“The testimony of the witness is this: These men had been on duty there at that time according to the testimony now in for 32 hours. Mr. Boryer has stated to the jury in his opening statement that they had orders not to dump on the bridges, not to clean the fires on the bridges; there was a reason why somebody disobeyed that and it ought to go to the jury.”

By the COURT.—“I think I will allow it.”
Defendant allowed an exception to the ruling.

“Q. (Mr. COBB.) State, if you know, if there was any reason that made it particularly difficult to clean fires with this sort of ash-pan at any other place.”

“A. The snow was deep on the side of the

track and you would have to dig out the snow on the side to get down and take out the pan.”

“Q. Would that condition exist on the trestle?” “A. No, sir.”

“Q. I want you to give the jury some idea if you can approximately of the condition of the snow on each side of the track, how it lay on each side of the track and whether it was hard or soft.”

“A. Well, I should judge it was three and a half to four feet deep along there after you got off the bridge and other places deeper, but from, I think, $3\frac{1}{2}$ to 4 feet deep, maybe deeper and came right up alongside of the rotary, that close (indicating) where you would have to dig out considerable and would naturally have a crust where the head of the rotary would be forcing against the snow—it would be rather hard digging right close to the track.”

“Q. So was it possible to clean that engine, the ashes out of that hoe pan, without first digging out that hard crust of snow, unless you cleaned them on the trestle?”

“A. No, not very well.”

11.

The Court erred in permitting witness Henry Lee to testify relative to what other railroads usually resort to see that track is in [401] order before train is sent out, and overruling objection of plaintiff in error to said testimony duly excepted to and exception allowed, which testimony was as follows:

“Q. (Mr. COBB.) Do railroads that you

have been accustomed to usually resort to any other method to see that the track is in order before a train is sent out?"

Mr. BORYER.—"We object to that as incompetent, irrelevant and immaterial and does not tend to prove anything under the issues as raised in the pleadings."

Objection overruled. Defendant allowed an exception. .

"A. Yes, sir."

"Q. What is done to safeguard the track besides the sprinklers?"

"A. Why, they have track-walkers."

12.

The Court erred in permitting witness Henry Lee, over the objections and exceptions of plaintiff in error duly allowed, to testify regarding running time on trip of December 28th and the number of hours continuously on duty, duly excepted to and exceptions allowed which testimony is as follows:

"Q. (Mr. COBB.) Coming back to the beginning of this trip—were you on the trip on which this train left here on the 28th of December, 1911?"

Mr. BORYER.—"We object to that as incompetent and irrelevant and tends to prove nothing under the issues and simply burdens the record."

By the COURT.—"It has already been testified to. Unless it is something different than he has already testified to, the objection will be sustained. I let you go back to the 25th."

Mr. COBB.—“This is preliminary and I think it is something new.”

“Q. Were you out on the trip of the 28th?”

Mr. BORYER.—“We object to that for the reason that it is incompetent, irrelevant and immaterial and tends to prove nothing under the issues.”

Objection overruled. Defendant allowed an exception.

“A. Yes, I left Cordova on the 28th.” [402]

“Q. How long were you out on that trip?”

“A. The time shows 24 hours between Cordova and Mile 39.”

“Q. Now, wasn't that the trip—I am not sure but I want to get at it—that the rotary was broken?”

“A. No, this was another rotary that was broken.”

“Q. Was there a rotary broken on that trip?”

“A. There was a rotary broken on this trip also.”

“Q. On the trip of the 28th?”

“A. I think so, yes.”

“Q. Where did the little rotary come from that was sent up to relieve the one that was broken at Mile 39 or 52 on the trip of the 30th?”

“A. A little rotary came from Cordova.”

“Q. It was sent out from Cordova?”

“A. Yes, sir.”

“Q. When you reached Tiekel, how many hours had you been continuously on duty up to

the time that you went off duty—how many continuous hours on that trip going up?”

Mr. BORYER.—“We object to that as incompetent and irrelevant and tends to prove nothing under the issues.”

Objection overruled. Defendant allowed an exception.

13.

The Court erred in sustaining defendant in error exception to questions asked witness Henry Lee regarding objection to hours worked, to which exception was taken and allowed, which questions were as follows:

“Q. (Mr. BORYER.) Did you raise any objection to going, to taking that trip out that morning?”

Mr. COBB.—“We object to that as irrelevant and immaterial.”

Objection sustained. Defendant allowed an exception.

14.

The Court erred in sustaining defendant's in error objection to witness Henry Lee testifying regarding work, which was duly excepted to and allowed, and which question was as follows:

“Q. (Mr. BORYER.) I will ask you if you have ever worked over the [403] required time as provided by law, and the service hour law, since September 1, 1912?”

Mr. COBB.—“Same objection.”

Objection sustained. Defendant allowed an exception.

15.

The Court erred in permitting witness Kenneth Holden to testify to time to make run from Cordova to Tiekel during month, and to overruling plaintiff's in error exception duly taken and allowed to following testimony:

"Q. You were in the employ of the company the whole month of December?"

"A. Yes, sir."

"Q. Did you make trips out over the road?"

"A. Yes, sir."

"Q. About how long would it take you during that month to make the run to Tiekel?"

Mr. BORYER.—"We object as incompetent, irrelevant and immaterial and tends to prove nothing under the issues in this case."

Objection overruled. Defendant allowed an exception.

"A. All the way from seven to twenty-four hours."

16.

The Court erred in permitting the witness Frank Townsend to testify relative to it being common or uncommon thing for bridges to be fired by engines passing over them, and in overruling the objection of plaintiff in error to such testimony, which was duly excepted to and exception allowed, said testimony being as follows:

"Q. (Mr. COBB.) I will ask you, from your experience as an engineer on railroads, if it is a very common or uncommon thing for bridges to be fired by engines passing over them?"

Mr. BORYER.—“We object to that question as incompetent, irrelevant and immaterial and not pertinent to the issues in the case.”

Objection overruled. Defendant allowed an exception.

“A. There was a time when they were all wooden bridges, it wasn't uncommon at all.”

[404]

The Court erred in refusing plaintiff in error to show how much of deceased earnings was given defendant in error for the use of her and the household expense which was duly excepted to and exception allowed which questions were as follows:

Q. (Mr. BORYER.) “What proportion of that did he give to you?”

A. “I had all of it.”

Q. “He turned it all over to you?”

A. “He did.”

Q. “For you to use or to keep for him?”

A. “To keep—to use what was necessary for our expenses.”

Q. “About how much would you use per month?”

Mr. COBB.—“I don't think that is a fair question and is not material.”

The WITNESS.—“It is according to where we were living.”

By the COURT.—“What is the purpose of the question?”

Mr. BORYER.—“The purpose is to show what portion of his salary was used in the household expenses and given to her.”

By the COURT.—“I don’t see that that would have anything to do with the elements of damages that would be necessary if any are considered by the jury, as I understand the law—unless you can call to my attention something I have overlooked.”

Mr. BORYER.—“That is a point I want to reserve in the case.”

By the COURT.—“You may reserve it—exception allowed.”

18.

The Court erred in making the following statement to the jury regarding the following letter:

By the COURT.—“I will say this to the jury—a letter from Mr. Baxter to this company, to this superintendent, probably would not be relative evidence at all unless it is later on connected with the Interstate Commerce Commission to Baxter or some one else. I do not understand that Baxter belongs to the Interstate Commerce Commission, or represents them in any way.”

Mr. BORYER.—“I will now read the letter.”

(COPY OF LETTER.)

COPPER RIVER & NORTHWESTERN
RAILWAY COMPANY.

Seattle, Washington, June 3, 1912.

R. W. Baxter,
Vice-President.

Mr. Geo. Geiger,
Superintendent, Cordova, Alaska.

Dear Sir:

We have been advised by the Interstate Commerce Commission that they will take charge of all railroads in Alaska August 1st, after which time it will be necessary for us to comply in all respects with the Commission's requirements and for your information and guidance am sending you under separate cover, one copy each of

Act to regulate commerce (as amended) and acts supplementary thereto, which include, Commerce Court Act, safety appliance Acts, Act requiring monthly report of accidents, Arbitration Acts, Hours of Service Act, Boiler Inspection Act.

Tariff Circular #18A and supplement #2 thereto and General Order #11.

Conference Rulings Bulletin #5, with Supplement #1 thereto and other supplements, bringing the Commissions conference rulings up to date.

Please acknowledge receipt of these publica-

tions, advising that you will comply with the requirements of Commission.

Yours truly,
(Signed) R. W. BAXTER,
V. P.

19.

The Court erred in refusing to permit plaintiff in error to show that the crew on the northbound train proceeded north from Miles Glacier or the halfway point between the two terminals—Cordova and Tiekel—willingly with the rotary that was working rather than attempt to return to Cordova with broken rotary, to which refusal plaintiff in error excepted and exception allowed, which offered testimony was as follows:

“Q. (Mr. BORYER.) Now, when X1 met you at Miles Glacier was there any of the crew that wanted to come back home that you know of?”

Mr. COBB.—“We object to that as irrelevant and immaterial.”

“Q. Did any of them raise any protest as to going any further?”

Mr. COBB.—“We object as irrelevant and immaterial.” [406]

Objection sustained. Defendant allowed an exception.

Q. “I will ask you if they did not proceed willingly, northbound?”

Same objection.

By the COURT.—“I consider it makes no difference under the law whether the employees

wanted to work or not."

Defendant allowed an exception.

20.

The Court erred in overruling defendant's Motion to Quash and Set Aside Summons and Service of Summons and Return of Summons, to which defendant excepted and exception was allowed.

21.

The Court erred in overruling defendant's Motion to Make More Definite and Certain and to Strike, to which defendant duly excepted and exception allowed.

22.

The Court erred in overruling Defendant's Demurrer to Complaint, to which defendant excepted and exception was allowed.

23.

The Court erred in overruling defendant's exception to jurors, wherein the second special venire was selected from and limited to the towns of Valdez and Seward, and excusing the first special venire which was drawn and selected from the body of the District who had reported for duty and not excused until after the second special venire had reported for duty from Seward and Valdez.

24.

The Court erred in denying motion of plaintiff in error for Directed Verdict, for the reason that the evidence of plaintiff shows that the plaintiff Reed was killed by reason of the burning of bridge 75A, that this bridge was burned by reason of the pan of the rotary being dumped on this bridge, that Reed

was in charge of the rotary and the fireman who cleaned this pan on the bridge saw him clean the pan on the bridge, knew it was [407] dangerous and against all rules and orders to clean pans on the bridges, and having cleaned and known that the rotary pan was cleaned on the bridge, violated the further rule of failing to see to or extinguish his fires dumped on the bridge, which rule was made for the safety of employees and passengers—to which *ruling duly* excepted and exception was allowed.

25.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“Was the cause of the death of Reed due to a negligence on the part of the defendant company in some duty reasonably imposed upon it, to be exercised by it in maintaining proper inspection of its road and roadbed, bridges and track and for which duty the defendant company is liable.”

26.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to or for the death of any of its employees, that such employee shall not be held to have as-

sumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

· 27.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“It is the duty of a railroad company to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating its train and engines over such road; and a failure of the railroad company to exercise reasonable and ordinary care in that respect is negligence which will render the company liable for all damages to an employee, or if killed, to his personal representative, for injuries resulting from such negligence. This duty to keep and maintain its roadbed, track and ways in safe condition is not satisfied merely by constructing it safe to begin with, but it is the duty of the company to have the track and ways watched and inspected at sufficiently reasonable intervals as to discover and repair or guard against defects arising from the operation of the road which would endanger the lives [408] and persons of its employees operating

its trains and engines over the same, and a failure to exercise ordinary care in that respect is negligence. If you find and believe from the evidence in this case that J. E. Reed was in the employ of the defendant as an engineer on or about January 1st, 1912, and that while so employed the engine upon which he was at work was derailed and he was killed, and that the accident in which he was killed was caused by the negligence of the defendant in failing to keep its roadbed, track or ways in a reasonably safe condition, then your verdict should be for the plaintiff."

28.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"If you find for the plaintiff under the instructions given you, you will determine the amount of your verdict. In arriving at this amount you will assess the damage at such sum as will compensate the plaintiff and her minor children for their pecuniary loss resulting from the death of the husband and father. In estimating this loss it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that capacity with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of

his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority.”

29.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are instructed that the defendant company is a common carrier by railroad; that as such it is liable in damages to the plaintiff and her two children for the death of J. E. Reed if such death you find resulted in whole or in part from the negligence of any of the defendant’s officers, agents or employees, or by reason of any defect due to the said defendant company’s negligence in its roadbed, bridge or ties or track at point of bridge 75A on said defendant company’s railroad on January 1, 1911.”

30.

The Court erred in giving the following instruction, to which [409] plaintiff in error excepted and its exception was allowed:

Instruction:

“You are further instructed that the defend-

ant company would be none the less liable under the foregoing instruction if you find that the said J. E. Reed may have been guilty of contributory negligence in causing the condition at Mile 75 which resulted in his death, but you are further instructed in this connection that if you should find that the negligence of J. E. Reed contributed to the cause of his death, the damages, if any, resulting should be diminished in proportion to the amount of negligence attributable to the said J. E. Reed in causing his death."

31.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that the act of March 4, 1907, passed by the Congress of the United States and applicable to the defendant company, its officers, agents and employees engaged in the transportation of passengers or property by railroad in the Territory of Alaska, provides that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty, until he has had at least ten consecutive hours off duty and no

such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having at least eight consecutive hours off duty, provided that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employee at the time said employee left a terminal and which could not have been foreseen, and provided further that the provisions of this act shall not apply to the crews of wrecking or relief trains. You are further instructed that this act became effective and in full force and effect on March 4, 1908."

32.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are further instructed that if at the time of the death of J. E. Reed the defendant company was guilty of violating the statute of the United States providing that [410] employees of its railroad should not be employed in any one day of twenty-four hours more than sixteen consecutive hours, without providing a rest of eight hours, and you further find the breach of this law by defendant in any way contributed to the injury and death of Reed, and then if you further find under the last above hereinbefore in-

struction that the said J. E. Reed was guilty of contributory negligence with the defendant company in causing his death, then the said contributory negligence of the said J. E. Reed, if any, should not be considered by you in assessing the damages, if any, against the defendant company in favor of the plaintiff and her children herein."

33.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that if you find the deceased was guilty of contributing by his negligent acts in dumping or knowingly permitting his fireman to dump and leave unextinguished cinders and ashes from his rotary on the bridge in question, and that this caused the death of J. E. Reed, yet if you further find that the defendant company was subsequently and before the time the rotary fell through the said bridge on January 1, 1912, negligent in not providing through its proper agents and employees the presence of a track walker to inspect the said road at the point in question, at bridge 75A, and you further find that such track walker was not so engaged by said defendant company and the presence of such track walker would naturally have discovered the condition of the bridge in time to have prevented the accident on January 1, 1912, then the said defendant is liable and your

verdict must be for the plaintiff.”

34.

The Court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are instructed that if you find the defendant company was in no way negligent in its duties to its employees and to the deceased, and the injury to the said deceased occurred alone by reason of deceased’s own negligence or the negligence of his fellow-servants, then your verdict must be for the defendant, unless you further find that the defendant was guilty of a violation of the labor hour laws as hereinbefore set out and such violation contributed to the injury of the deceased.”

35.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if the Rules of the Copper River & Northwestern Railway Company required the deceased to [411] extinguish all fire in ashes removed from ash-pans of his engines or rotary and the fire removed from the engine or rotary was not extinguished and this fire was the cause of the roadbed being out of repair and the ties burned and destroyed by reason of same having been dumped upon the

roadbed at the point or place where the deceased was injured, then you are instructed that the deceased assumed the risks of not seeing that the fire was out and cannot recover in this case.”

36.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if the Copper River & Northwestern Railway Company’s roadbed was out of repair, the ties burned and destroyed by ashes and cinders by being dumped upon the roadbed and said deceased knew that ashes and cinders had negligently been allowed to be dumped upon the roadbed which ashes and cinders caused the ties to be burned and destroyed by ashes and the roadbed made unsafe, you are instructed that the plaintiff cannot recover in this case.”

37.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that it was the duty of the deceased in this case to obey all rules and regulations of the Copper River & Northwestern Railway Company and that if the deceased failed, neglected or refused to obey said rules

and his injury was caused by reason of the deceased failing, neglecting or refusing to obey said rules, the deceased was guilty of contributory negligence.”

38.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased, J. E. Reed, was engineer of the rotary and as such engineer, he has charge of the rotary, and as such engineer he is responsible for the conduct and acts of the fireman and from the evidence you find that the fireman of the rotary dumped or cleaned the pan of the rotary on the bridge and that this was the cause of the unsafe condition of the roadbed, then you are instructed that the deceased cannot recover in this action.” [412]

39.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that it was the duty of the deceased to know the contents of the time-table in use on the road at the time of the accident to him and a time-table was in use and that said time-table

contained certain special rules, one of which stated where the bulletin-books are located, and it was the duty of the deceased to examine the bulletin-books and said bulletin-books were accessible and contained a bulletin that required the deceased to extinguish all fire in ashes removed from ash-pans, and you find that deceased failed to extinguish all fire removed from the ash-pan of his rotary and that his failure to extinguish or see that it was extinguished caused the bridge to burn and make the roadbed unsafe and this was the cause of J. E. Reed's death, then you are instructed that the deceased was guilty of negligence for which the defendant, Copper River & Northwestern Railway Company, cannot be held liable."

40.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan

of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence.”

41.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the [413] bridge, then you are instructed that the deceased was guilty of negligence and cannot recover in this action.”

42.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased as engineer of the rotary is responsible for the acts of the fireman and the fireman of his rotary cleaned the pan of the

rotary on the bridge and it was dangerous to clean the pan on the bridge and the bridge was made unsafe by reason of the pan having been cleaned thereon and the deceased met his death by reason of the unsafe condition of the bridge caused by the pan being cleaned thereon, then you are instructed that the deceased was guilty of negligence and cannot recover in this action."

43.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased knew that the fireman on the rotary cleaned his pan on the bridge, which was made unsafe by reason of the fireman cleaning his pan on the bridge and the deceased met his death by reason of the fireman cleaning his pan on the bridge and failing to extinguish all fire from the ashes of the pan cleaned on the bridge, then you are instructed that the deceased assumed all of the risks and hazards arising from or by reason of the pan being cleaned on the bridge."

44.

The Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased had charge of the rotary and had supervision over the fireman and is responsible for the acts of the fireman in connection with the fireman’s work around and upon the rotary, and you further find that the fireman of the rotary cleaned his pan on the bridge and by reason of having cleaned the pan on the bridge, the bridge was made unsafe and the deceased met his death by reason of the unsafe condition of the bridge, then you are instructed that deceased cannot recover in this action.”

45.

The Court erred in refusing to give to the jury the following instruction [414] requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased was in charge of the rotary and as such had supervision over the fireman and that it was the deceased’s duty to see that the fireman extinguished all fire in ashes removed from the ash-pan on the rotary and the deceased failed or neglected to do this, and by reason of the deceased’s failure to see that the fireman extinguished all fire and he met his death by reason of failure to see that the fireman extinguished all fire, then you are instructed that the deceased was guilty of negligence and plaintiff cannot recover in this action.”

46.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased’s injury was caused by reason of negligence of the fireman of a fellow-servant of the deceased, that he cannot recover in this action.”

47.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that the burden is upon the plaintiff to establish her cause of action by a preponderance of evidence and cannot recover unless she proves by the preponderance of evidence not only that the defendant, Copper River & Northwestern Railway Company, was negligent, but must also prove that the defendant’s negligence contributed to the cause of the injury to the deceased and if she fails to establish these facts by the preponderance of the evidence, the plaintiff cannot recover.”

48.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and

its exception was allowed:

Instruction:

“You are instructed that it was the duty of the deceased, J. E. Reed, to be conversant with the rules of the Copper River & Northwestern Railway Company pertaining to the [415] running and operating of the rotary including rules regarding the extinguishing of fire from the ashpan of his rotary.”

49.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased, J. E. Reed, disobeyed any rule of the Copper River & Northwestern Railway Company and he was injured or killed by reason of his disobeying said rule or rules, you are instructed that the plaintiff cannot recover in this action.”

50.

The Court erred in denying the motion of plaintiff in error for judgment in this case in its favor and against said plaintiff, notwithstanding the verdict rendered in said cause, to which plaintiff in error excepted and its exception was allowed.

51.

The Court erred in denying the motion of plaintiff in error for a new trial and in its order and judgment overruling such motion and granting judgment

in favor of plaintiff for the amount of the verdict found by the jury in favor of plaintiff with costs, which order and judgment was duly excepted to by defendant and its exception allowed by the Court. Said motion was based on the files and records and proceedings herein, and was made upon the following grounds specified therein and on each thereof, to wit:

I.

“Insufficiency of evidence to sustain or justify the verdict in the following particulars:

A. That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

B. In that plaintiff based her cause of action because on the [416] first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed. That the plaintiff had agreed and stated that the words “and otherwise suffered to become utterly unsafe and unfit as a roadbed” applied to said ties being burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.

C. That the plaintiff’s witnesses admitted that on the night of December 30th, 1911, the plaintiff’s deceased husband was in charge of and had charge over Rotary X1, that the fireman of this rotary was under the supervision and instructions of the deceased husband, who was engineer and had charge of said ro-

tary; that the fireman of this rotary against the rules and orders of the defendant company cleaned or dumped the ash-pan of his rotary on bridge 75A, which bridge was destroyed by fire by reason of the ashes being dumped from said rotary on the day of January, 1912; that the plaintiff's deceased husband was killed by reason of the fire of said bridge caused by reason of the ash-pan of said rotary being dumped or cleaned on said bridge, which act was against a known rule of the company and the further known rule that required the plaintiff's deceased husband to extinguish all fire from ashes removed from ash-pan at any and all places."

II.

A. "That plaintiff's witnesses admitted that they left Cordova on the 30th of December, 1911, the first terminal of the Copper River & Northwestern Railway Company, or the defendant, and that the second or next terminal of defendant company is located at Tiekel or Mile 101 beyond a point where Bridge 75A is located; that said bridge being located on Mile 76 and being between the terminal at Cordova and Tiekel.

B. "That the plaintiff's evidence shows conclusively that the [417] reason they were delayed and required to be on duty from the time they left Cordova until they reached Tiekel was because that the rotary that they started from Cordova with met with an accident which necessitated repairing said rotary and returning it to Cordova, and that they were required to await the arrival of another rotary from Cordova, and that during all of the time between said

terminals they were on a single track and were fighting snow, and that it was dangerous to stop said rotary while fighting snow, for the reason that a snow or wind would possibly snow them in and delay them for an indefinite time; that said railroad of the defendant is a single track from Cordova, its first terminal and Tiekel, its second terminal. That the acts which required said employees to be on duty for the time that they were on duty was caused by casualties and unavoidable accidents and the act of God and could not have been foreseen by the defendant, and that said delay was not the result of a cause known to the carrier or its officers, agents in charge of said employees at the time said employees left the first terminal nor which could have been foreseen by the defendant."

C. "That the plaintiff's witness Albright, who cleaned the ash-pan on the bridge, which fire caused the bridge to burn that caused the death of plaintiff's husband, admitted that the reason he violated the rule of cleaning his fire on the bridge and the further rule of seeing that all fire from ashes removed from ash-pan is extinguished, was because they wished to save time, and for the further reason that if he cleaned the pan off of the bridge he would have been required to shovel some snow from the side of the track so that he could use his hoe for the purpose of cleaning out his pan."

III.

"That Bridge 75A was shown to be a safe bridge from the evidence for the reason that this rotary with its engines on the night before the accident to the

plaintiff's deceased husband had crossed this bridge several times; that there were not any evidence in this case [418] to show that a track-walker or section-man is necessary over that particular portion of the road, nor does the law require that the defendant keep a track-walker or section-man for the purpose of seeing that engineers or trainmen obey rules and orders."

IV.

"That the verdict is against the evidence and law."

V.

"That the amount of damages allowed in this case is excessive and was influenced by passion or prejudice."

VI.

"Errors of law occurring in the trial and exceptions made by the defendant."

VII.

"Accident or surprise by which ordinary prudence could not have guarded against."

VIII.

"In denying defendant's motion for a directed verdict."

IX.

"That the plaintiff bases the accident upon the following negligence as alleged in her complaint in paragraph 3, which is as follows: 'That on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a

roadbed,' it being ruled by this Court on a motion to make more definite and certain and being agreed by attorney for the plaintiff that the following words: 'and otherwise suffered to become utterly unsafe and unfit as a roadbed,' referred to ashes and cinders being negligently dumped upon the roadbed. That the plaintiff against the objections of the defendant and exceptions taken introduced in evidence [419] matters relating to track-walkers and hours of work performed by the crews of the rotary and other engines pushing the rotary and the train crews on the local train, of the trip of said rotary and trains from the time they left Cordova terminal on the 30th of December, 1911, up until the night of the accident, January 1, 1912. That the pleadings and issues as made up in this case do not allege or in any way refer to such facts as would permit the defendant to anticipate that such evidence would be brought out or introduced or that the plaintiff was basing her cause of action partly on such acts and facts."

X.

"For the further reason that the instructions given on page 3 require that the jury consider whether J. E. Reed met his death by reason of the negligence of the defendant company in failing to maintain and inspect its road, and roadbed, bridges and track, that the law does not require the defendant to maintain and keep inspectors of roadbed, bridges and track until it has been shown by the plaintiff that such was necessary, and in no event does the law require the defendant to keep inspectors for the purpose of inspecting roadbed and bridges for the safety of one

who violates a rule and by violating said rule makes the roadbed or bridge unsafe.”

XI.

“For the further reason that the Court, on page 5 of its instructions, instructed the jury that in any action brought against any common carrier under or by virtue of any of the provisions of the Act referred to on said page, to recover damages for injuries to or for the death of any of its employees, that such employees shall not be held to have assumed the risks of his employment in any case where the violating of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. [420]

“That there are no allegations in the complaint and no evidence in the case to the effect that the said J. E. Reed met his death by *by* reason of the defendant violating any statute enacted for the safety of employees which contributed to the injury or death of the said J. E. Reed, and for the further reason that it was shown by the evidence that all work performed by the said J. E. Reed and other employees of the rotary crew and train crews was performed on a single track railway between Cordova, their starting terminal and the next terminal at Tiekel or Mile 101, and that the cause of the death of J. E. Reed was the burning of the Bridge 75A on Mile 75, the fire of which was caused by the deceased *permitted* his fireman to clean his rotary pan on this bridge, and for the further reason that he did not require or did not put out or extinguish all fire from ashes dumped from this pan onto the bridge, which is contrary to the rules of

the company, and plaintiff's evidence shows that the reason he dumped or cleaned his pan on this bridge was because he wished to save time and so he would not be required to shovel some snow from the side of the track where he could stand so as to pull his fire."

WHEREFORE, the defendant, plaintiff in error, prays that said Judgment may be *rendered, vacated* and set aside, and that the verdict found by the jury on which said Judgment was based may be vacated and set aside, and for such other and further relief or both in the premises as may be proper.

R. J. BORYER,

Attorney for Copper River & Northwestern Railway Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division, Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [421]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

Acknowledgment of Service of Papers on Writ of Error.

Service of the Petition for Writ of Error, Order Allowing Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court on the 17th day of July, A. D. 1913, is hereby acknowledged, and receipt of true copies thereof on this 17 day of July, A. D. 1913, is also acknowledged.

J. H. COBB,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 18, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [422]

[Hearing In Re Settlement of Bill of Exceptions.]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

In the Matter of the Appeal of Mrs. E. A. REED,
Administratrix of the Estate of J. E. REED,
Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

HEARING IN RE SETTLING BILL OF EX- CEPTIONS.

7:30 P. M., July 17, 1913.

Hon. F. M. BROWN, District Judge, Presiding;
Mr. JOHN H. COBB, for Plaintiff;

Messrs. R. J. BORYER and J. R. WINN, for
Defendant.

Mr. BORYER.—If it please your Honor, I have a stipulation I would like to file in this case petitioning for writ of error. This is a petition for writ of error in the case of Mrs. Reed *versus* The Copper River & Northwestern Railway Company. It has been agreed between counsel that the bond could be furnished by the surety company and that the amount be fixed in the sum of \$25,000. That is correct?

Mr. COBB.—That was the agreement, but the agreement was made more than sixty days ago and I don't think that this Court or any other, for that matter, has any power to approve anything more than a cost bond at this time. And if the Court has any doubt about that proposition * * * (offers to cite authorities). * * *

Mr. BORYER.— * * * The stipulation provides—the record will show, I think—that the stay of execution was for sixty days—the original stay of execution was for sixty days which terminated on the 15th of July, and this was for the purpose of giving further time in order to get the bond; in order to file the bond at this time and that was extended over to August the 1st of this year. I think Judge Winn recalls [423] those facts.

Mr. COBB.—No question about that. * * *

Mr. WINN.— * * * (After referring to *Pearce v. Sutherland*.) That simply shows that the Court will not encourage these technical points unless they are absolutely forced to do it, and I think in view of the circumstances besides of this stipulation not stating all the facts connected with it that we should possibly corroborate that or explain it by affidavits that this bond was agreed upon at that time, and I don't doubt but what counsel can agree upon extending the time to file the bond and have it approved by the Court. The only object they entered into that stipulation was to give Mr. Boryer time to get this bond or stay of proceedings granted for that purpose.

Mr. COBB.—That is all true. There is no difference between counsel. The only point about the matter is this: that within sixty days they did not sue out their writ of error. Could have got the supersedeas bond any time after that. I wouldn't care if they had taken to the 1st of August, but here is the situation. There is no question, I think, under the decisions that the Court is absolutely without legal power to make any supersedeas. * * *

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy.

Filed in the District Court, District of Alaska, First Division. Jul. 18, 1913. E. W. Pettit, Clerk. By ———, Deputy. [424]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Affidavit of R. J. Boryer in Support of Supersedeas
Bond.**

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That he is now and has been at all times Attorney of Record for the defendant; that Judgment was entered in this case on the 6th day of May, 1913, at which time the Honorable Peter D. Overfield, the presiding Judge, entered an order allowing until July 14th for settling, signing and filing Bill of Exceptions and a stay of execution during said time. That shortly thereafter the said Honorable Peter D. Overfield was called from the Third Judicial Division, over which he presided, to the First Judicial Division for the purpose of holding court. That shortly after arriving in the First Judicial Division the said Court proceeded to the States and during his stay in the States his term of office expired and the Honorable Fred M. Brown was ap-

pointed Judge of the Third Judicial Division to succeed the Honorable Peter D. Overfield, after which the Honorable Fred M. Brown was called to the First Judicial Division for the purpose of holding a term of Court. That while the Honorable Peter D. Overfield was in Juneau, Alaska, and prior to [425] the appointment of the Honorable Fred M. Brown as Judge of the Third Judicial Division, there was no Judge presiding in the Third Judicial Division, all of which was between the date of entry of Judgment in this case and the time allowed for the settling and signing of the Bill of Exceptions and the stay of execution, to wit, between the 6th day of May, A. D. 1913, and the 14th day of July A. D. 1913; that by reason of the Honorable Peter D. Overfield being called to Juneau for the purpose of taking up judicial matters in the First Division and his departure for the States, and the Honorable Fred M. Brown being called to the First Judicial Division from the Third Judicial Division for the purpose of holding court, this affiant found it necessary to take up with the attorney for the plaintiff in this case, J. H. Cobb, a stipulation extending the time for suing out a Writ of Error and perfecting its Writ of Error including stay bond in this case. That J. H. Cobb, attorney for the plaintiff in this case, resides in Juneau, Alaska, a distance of about 600 miles from Cordova, where this affiant resides, and is only accessible by steamers about every 6 or 8 days; that this affiant wired John R. Winn, of Juneau, requesting him to secure from J. H. Cobb further extension of time to settle bill of exceptions and perfect rec-

ord for Appellate Court in the above case; that this affiant left Cordova for the purpose of going to Juneau to secure a stipulation from J. H. Cobb regarding the furnishing of a stay bond, signed by the American Surety Company and the amount of stay bond, and all proceedings necessary to perfecting Writ of Error in the above-entitled case. That upon my arrival in Juneau I took up with Mr. J. H. Cobb the matter of a stipulation extending the time for filing and presenting Writ of Error and stay bond to be signed by the American Surety Company and the amount of said bond; that the said conversation took place on Sunday and it was my understanding from my conversation with Mr. Cobb [426] that he consented and agreed that the defendant was to have until the first day of August, 1913, for the purpose of filing the Writ of Error in the above-entitled case and until said date to secure and file a stay bond in the aforesaid Writ of Error, and that Mr. Cobb agreed that he would accept a bond in the amount of \$25,000.00, signed by the American Surety Company, which bond he consented could be filed on or before the first day of August, A. D. 1913, and which bond was to act as and be a stay bond pending the decision of the Circuit Court of Appeals on Writ of Error to be sued out in the aforesaid case. That upon this understanding I immediately proceeded to Seattle on the same day for the purpose of securing the aforesaid bond, and did secure said bond according to my agreement with Mr. Cobb, and relying on said understanding returned to Juneau for the purpose of suing out the aforesaid Writ of Error and

filing the aforesaid bond according to my understanding with Mr. Cobb. That part of the aforesaid conversation and agreement was in the presence of John R. Winn, an attorney residing in Juneau, Alaska; that I have read the affidavit of John R. Winn, and the same is correct as to the matters and facts therein contained and the same took place in my presence. That relying on the above understanding, and it having been agreed that the stipulation was to be drawn and signed the following day and given to John R. Winn, I proceeding to Seattle for the purpose of getting aforesaid bond, which bond I secured in Seattle, signed by the American Surety Company in the amount of \$25,000.00, as per our agreement, and returned to Juneau for the purpose of having same filed and approved to stay execution in this case pending appeal, and hereby tender said bond at this time in this Court in the above-entitled case.

That by reason of the above understanding regarding the accepting of the aforesaid bond and filing of Writ of Error, and that the giving of said bond was consented [427] to by plaintiff's attorney, and was to be and act as a supersedeas bond pending the determination by the Circuit Court of Appeals of the Writ of Error in said case if filed on or before August 1st, 1913, this affiant did not file the Writ of Error or the Supersedeas bond until such date as they were presented and filed in this court, otherwise said Writ of Error and bond would have been filed on or before the 14th day of July, 1913.

That this plaintiff, Mrs. E. A. Reed, and the estate of J. E. Reed, deceased, in this case, have no property or money exempt from execution, and that if the judgment in this case should be reversed, and execution issued prior thereto against the defendant, the Copper River & Northwestern Railway Company, said defendant would be unable to recover said money.

That the defendant, Copper River & Northwestern Railway Company, is the owner of a railroad and right of way and equipment for running and operating a railroad, which railroad extends from Cordova, Alaska, to Kennecott, Alaska, a distance of 195 miles, and which road and equipment cost approximately twenty million dollars, and is now worth that amount, and is now operating and is solvent and able to respond and pay any final judgment obtained in this case, and unless a supersedeas bond is allowed said Writ of Error and its effect will be defeated.

R. J. BORYER.

Subscribed and sworn to before me this the 18th day of July, A. D. 1913.

[Seal]

R. E. ROBERTSON,

Notary Public in and for the District of Alaska,
Residing at Juneau.

Commission Expiring June 19, 1917.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 18, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [428]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Affidavit of J. R. Winn in Support of Supersedeas
Bond.**

United States of America,
District of Alaska,—ss.

John R. Winn, being first duly sworn, upon his oath deposes and says: That I am a member of the Bar of the above-entitled court and am acquainted with J. H. Cobb and R. J. Boryer, two other members of said Bar. That this affiant had no connection with the above-entitled case as an attorney until some time just prior to the 29th day of June, A. D. 1913, at which time I received a telegram from R. J. Boryer from Cordova, Alaska, his place of residence, which telegram states substantially that he would be in Juneau on the steamer "Alameda" on or about the 29th day of June, and he desired me to see Mr.

'Cobb and obtain from him a stipulation for further time in which to settle the Bill of Exceptions and perfect the record for the Appellant Court in the above-entitled cause. However, I did not see Mr. Cobb until Mr. Boryer's arrival at Juneau on the 29th day of June, and at that time I entered the law office of Maloney & Cobb in the town of Juneau, found Mr. Boryer and Mr. Cobb engaged in conversation concerning the perfecting of the record in the [429] above-entitled cause for the Appellant Court and the obtaining of a supersedeas bond. Mr. Boryer desired thirty (30) days from the 14th day of July for the purpose last mentioned, but Mr. Cobb suggested that he thought the record ought to be perfected and a supersedeas obtained by August 1st, which said last mentioned time was agreed upon by and between Mr. Cobb and Mr. Boryer in my presence. Then Mr. Boryer stated, "Now, Mr. Cobb, it is understood that you will agree to a stay of execution until the first day of August, until I procure a Surety Company Bond to act as a supersedeas during the pendency of the action before the Appellant Court, and that you will accept a Surety Company Bond instead of the ordinary bond that is procured in cases of this kind," and Mr. Cobb said that he would agree to these matters, and it was agreed between Mr. Boryer and Mr. Cobb in my presence that the bond should be in the amount of \$25,000.00. That Mr. Cobb then agreed to draw up the stipulation in this case according to the undertaking that he had had with Mr. Boryer. Mr. Boryer then on that day departed for the

south, and on the following day Mr. Cobb drew up the stipulation which has been filed in this case, and when he presented it to me for my signature, I insisted that he should write therein the last clause, which reads as follows: "and execution shall not issue prior to said date," meaning the first day of August. I stated to Mr. Cobb at that time that unless that clause was put in something might happen that execution might issue before Mr. Boryer could put up a supersedeas bond, and Mr. Cobb wrote the clause in in his own handwriting. There is no question but what Mr. Cobb absolutely agreed that when the Surety Company Bond was filed that it was to act as a stay bond pending the decision of the Appellant Court in this case.

JNO. R. WINN.

Subscribed and sworn to before me this the 18th day of July, 1913.

[Seal]

R. E. ROBERTSON,

Notary Public in and for the District of Alaska,
Residing at Juneau, Alaska.

Commission [430] Expiring June 19, 1917.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 18, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [431]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Counter-affidavit of J. H. Cobb on Application for
Supersedeas Bond.**

United States of America,
Territory of Alaska,—ss.

J. H. Cobb, being first duly sworn, upon his oath deposes and says: I am the attorney for the plaintiff in the above-entitled action. I have read the affidavits of R. J. Boryer and John R. Winn, dated the 18th day of July, 1913. Said affidavits are incorrect as regards what transpired on Sunday, the 29th day of June, 1913.

What did transpire on said day is as follows: The defendant company, having a stay of execution of sixty days, in which to settle bill of exceptions, which stay was granted, by Judge Overfield, Mr. Boryer, attorney for defendant, called on me on said 29th day of June, with Judge Winn, and asked me for a further extension of 30 days in which to settle the bill of exceptions, as Mr. Hamburger had not been able to get out his notes of the testimony.

I answered, inasmuch as any judge would grant such an extension, I was willing to so stipulate, but suggested he could get his bill of exceptions ready by August 1st, which date was agreed upon. [432]

Mr. Boryer then stated that they were going to get a bond with the American Surety Company as surety, and asked if I would accept such bond without objection for \$25,000.00, and I told him that I would. Regarding the matter of the bond, however, no stipulation was asked.

It was further agreed that the stipulation be reduced to writing next day, Monday, and Judge Winn would notify Mr. Boryer of the signing of the stipulation by wire to Ketchikan, where he would be on a steamer southbound at that time.

At no time in our conversation was the matter of suing out of the writ of error mentioned by anyone, and no request was made for stipulation extending time for suing out writ of error, within the time to make it operate as a supersedeas upon giving of surety.

On Monday following the above conversation, the stipulation was drawn in strict accordance with the above understanding, and is now on file herein. All this occurred more than two weeks before the expiration of time in which defendant could have sued out writ of error within which supersedeas could be given.

The clause in the stipulation against the issuance of execution prior to August 1st was put in at Judge Winn's request, but again nothing was said of the writ of error, or the time when it should be sued out.

I am sure that if I had been asked to enter into a stipulation to the effect that the writ of error might be sued out after the expiration of sixty days, Sundays excluded, from the date of judgment, and that a supersedeas and security be then given, I should have declined to enter into such stipulation on the ground that even by stipulation the bond so given would not be binding upon the surety, nor did it ever occur to me that what was said on June 29th would ever be claimed to mean anything further than was expressed in the stipulation, [433] drawn pursuant thereto on the day following, and which is now on file herein.

J. H. COBB.

Subscribed and sworn to before me this the 18th day of July, 1913.

V. A. T. ZOTT,

Notary Public in and for Alaska.

Commission Expires Feb. 20, 1917.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 18, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [434]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

MRS. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order on Supersedeas Bond.

Copper River & Northwestern Railway Company, by its attorney, having filed on the 17th day of July, A. D. 1913, petition for a Writ of Error, Assignment of Errors, and Bill of Exceptions, and said date having been fixed as a day for settling and signing said Bill of Exceptions, and said Copper River & Northwestern Railway Company, by its attorney, having presented a supersedeas bond for approval on said date, J. H. Cobb, attorney for plaintiff, defendant in error, objected to the Court approving said bond as a supersedeas or allowing a supersedeas, for the reason that the Court has no power to approve or allow said bond as a supersedeas bond or allow a supersedeas after the expiration of sixty (60) days, Sundays excluded, from the rendition of the Judgment. This objection of plaintiff having been taken under advisement and having been duly considered,

It is hereby ORDERED, ADJUDGED and DECREED that said objection be sustained, for the reason that after the expiration of sixty (60) days, Sundays excluded, from the date of the rendition of the Judgment, this Court does not have power to approve said bond or allow a supersedeas, the time for approving same under the statute having passed.

To which ruling the Copper River & Northwestern Railway Company, by its attorney, duly excepted, and its exception was allowed.

Dated this the 18th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [435]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order Staying Execution.

Copper River & Northwestern Railway Company having presented a bond to act as a supersedeas bond pending appeal in the above case, and objection having been raised by J. H. Cobb, attorney for plaintiff in this case, to the Court having power to approve said bond as a supersedeas bond, and the said J. H. Cobb having stated in open court that execution in this case would be withheld until counsel for defendant have an opportunity to present its application for stay of execution and supersedeas bond to the United States Circuit Court of Appeals for the Ninth Circuit at the session of said court in Seattle, Washington, in September, 1913,—

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that execution in this case be withheld until counsel for defendant, plaintiff in error, have an opportunity to present its application for supersedeas bond and stay of execution to the United States Circuit Court of Appeals for the Ninth Circuit at the session of said court in Seattle, in September, 1913.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [436]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Motion to Transmit Original Exhibits.

Comes now the defendant and moves the Court for an Order directing the Clerk of Court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the original exhibits in this cause, said exhibits being numbered, Plaintiff's Exhibits "A," "B," "C," and "D," and Defendant's Exhibits No. 1, 2 and 3, for the reason that it is impossible to copy all of said exhibits.

R. J. BORYER,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [437]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, a Corporation,
Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY,
Defendant.

**Order [Directing Transmission of Original Exhibits
to Appellate Court].**

On motion of the Copper River & Northwestern Railway Company, for an order requiring and directing the Clerk of this Court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit the original exhibits in this cause, being numbered Plaintiff's Exhibits "A," "B," "C," "D," and Defendant's Exhibits "1, 2, 3," and it appearing to the satisfaction of the Court that said original exhibits should be returned to the Court of Appeals and that said motion should be granted,—

NOW, THEREFORE, it is hereby ORDERED that the Clerk of this court be and he is hereby authorized and directed to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit each and all of the said original exhibits in this cause as a part of the return to the Writ of Error in this case.

Dated this the 17th day of June, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [438]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,
Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendant.

**Order Certifying Up Papers Regarding
Supersedeas Bond.**

This matter coming on for hearing on the motion of counsel for defendant, to make all of the papers filed upon the application for supersedeas bond a part of the records to be forwarded to the Appellant Court, and said motion is allowed and is hereby ordered that the Stipulation heretofore entered into between the attorney representing the respective parties on the 30th day of June, A. D. 1913, respecting

the stay of execution, etc., until the first day of August, A. D. 1913, also the affidavit of John R. Winn, the affidavit of R. J. Boryer and the affidavit of J. H. Cobb, and the stenographer's notes of the admission of J. H. Cobb in open court concerning the supersedeas, and any and all papers connected with said application are hereby made a part of the record of this case, and the Clerk is ordered to certify the same upon the Writ of Error herein.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [439]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Praeipie for Transcript.

To the Clerk of Above Court.

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California, a copy of the record in the above-entitled cause as a return to the Writ of Error heretofore sued out of said Circuit Court of Appeals to review the judgment in said cause, consisting of the following files, records and proceedings in said cause:

Complaint.

Motion to Quash Service and Affidavit regarding same.

Order on Motion to Quash Service and Exception.

Motion for Change of Place of Trial.

Motion and Order Withdrawing Motion for Change of Place of Trial.

Motion to Make More Definite and Certain.

Order and Exception on Motion to Make More Definite and Certain, and Minute Order which states the following words: "*and Otherwise suffered to become utterly unsafe and unfit as a roadbed,*" that said clause qualified and had reference to the dumping of ashes on the roadbed, and amendments to complaint by interlineation.

Demurrer and Order on Demurrer and Exception.

[440]

Answer.

Reply.

Order for the Selection of Petit Jury for April Term, 1913, at Cordova.

Order for First Special Venire.

Order for Second Special Venire.

Order Excusing First Special Venire.

Record showing exception to dismissal and excusing of First Special Venire.

Exception to Jurors and Exhibits attached.

Motion for Nonsuit and Order Denying same.

Defendant's Request for Instructions to Jury.

Motion for Directed Verdict, order and exception to same.

Motion for Judgment notwithstanding same and Order and Execution on same.

Motion for New Trial, Order and Exception on same. Verdict.

Judgment.

Order Extending Time to Make and File Exceptions.

Order Extending Time to Prepare, Serve and File Bill of Exceptions.

Admission of Service of Bill of Exceptions.

Bill of Exceptions, with Judge's certificate and Court stenographer's certificate attached thereto.

Order Settling and Allowing Bill of Exceptions.

Certificate of Judge to Bill of Exceptions.

Petition for Writ of Error.

Order Allowing Writ of Error and Fixing the Amount of Penalty of Supersedeas Bond.

Assignment of Errors.

Bond for Costs and Supersedeas on Writ of Error.

Writ of Error, and Copy.

Order Directing Transmission of Original Exhibits to Appellant Court.

All Minute and Journal Entries and Orders. [441]

Citation, and Copy.

Acceptance of Service of Papers on Writ of Error.

Motion and Order to Send Up Original Exhibits.

This Praecipe.

R. J. BORYER,

Attorney for Defendant.

Dated Aug. 1st, A. D. 1913.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 1, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [442]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Order to Transfer Records and Files to Third
Division.**

The motion of R. J. Boryer, attorney for defendant herein, to transfer the Records and Files in the above case to the Clerk of the court of the Third Division, at Valdez, Alaska, in which said records and files belong,

It is hereby ORDERED that the Clerk of the court of the First Division forward forthwith the records

and files in the above-entitled case to the Clerk of the court, Third Division, at Valdez, Alaska.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge. [443]

**[Plaintiff's Exhibit "A"—Decree Appointing
Administratrix.]**

*In the Probate Court of the Territory of Alaska,
Cordova Precinct.*

Before O. A. TUCKER, U. S. Commissioner and Ex-
officio Probate Judge.

In the Matter of the Estate of JOHN E. REED,
Deceased.

DECREE APPOINTING ADMINISTRATRIX.

ESTHER REED, wife of John E. Reed, deceased, having on this 17th day of January, A. D. 1912, filed in this court a petition praying that she be appointed administratrix of the estate of the said John E. Reed, deceased, and also an affidavit setting forth the names and residence of the heirs of said deceased, and that said deceased died intestate, and the Court being fully advised in all the premises,

Now, Therefore, IT IS CONSIDERED, ORDERED, ADJUDGED and DECREED that the said Esther Reed be, and she hereby is appointed Administratrix of the estate of John E. Reed upon furnishing of a bond according to law, the same to be filed in this court, fixed in the sum of Five Hundred Dollars (\$500).

AND IT IS HEREBY ORDERED that Letters of Administration upon the estate of said John E. Reed, deceased, issue to the said Esther Reed.

Done in open court this 12th day of January, A. D. 1912.

[Commissioner Seal] O. A. TUCKER,
U. S. Commissioner and Ex-officio Probate Judge.

I hereby certify that the above is a true and correct copy of DECREE APPOINTING ADMINISTRATION on file in my office.

Cordova, Alaska, April 29, 1913.

[Seal] A. J. ADAMS,
U. S. Commissioner and Ex-officio Recorder.

Plaintiff's Exhibit "A." Cause No. C.—50.
[443A]

**[Plaintiff's Exhibit "B"—Letters of
Administration.]**

*In the Probate Court for the District of Alaska,
Third Division, in and for Cordova Precinct.*

Before O. A. TUCKER, Commissioner and Ex-
officio Probate Judge.

In the Matter of the Estate of JOHN E. REED, De-
ceased.

LETTERS OF ADMINISTRATION.

District of Alaska,
Cordova Precinct,—ss.

To all persons to whom these presents shall come,
Greeting:

Know ye, that it appearing to the Commissioner

aforesaid that John E. Reed has died intestate, leaving at the time of his death property in this District, such Commissioner has duly appointed Mrs. Esther A. Reed administratrix of the Estate of such JOHN E. REED, Decd. This, therefore, authorizes the said Esther A. Reed to administer the estate of the said John E. Reed, deceased, according to law.

In testimony whereof I have hereunto subscribed my name and affixed the seal of this court said 17th day of January, 1912.

O. A. TUCKER,

Commissioner, and Ex-officio Probate Judge.

United States of America,
Territory of Alaska,—ss.

I, A. J. ADAMS, U. S. Commissioner and ex-officio Probate Judge for Alaska, Third Division, Cordova Precinct, do hereby certify that the above and foregoing is a full, true, and correct copy of the Letters of Administration in the case of the Estate of John E. Reed, Decd., as the same appears on file in my office in said cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court this 29th day of April, 1913.

[Seal]

A. J. ADAMS,

U. S. Commissioner and Ex-officio Probate Judge.

Plaintiff's Exhibit "B." Cause No. C.—50.

[443B]

[Plaintiff's Exhibit "C."]

AMERICAN LOCOMOTIVE COMPANY



The Rotary Snow Plow

The only plow for removing snow of any character and any depth, quickly and easily, without danger to equipment and men.

AMERICAN LOCOMOTIVE COMPANY



Rotary snow plow, built for the Denver, North-
western & Pacific Railway

—4—

Plaintiff's Exhibit C. Cause No. C.—50. [443C]

Rotary Snow Plow

The dangers attending the use of snow plows of the wedge type in heavy drifts are thoroughly well known by railroad men. So also are the limitations of this type of plow in deep drifts and in hard-packed icy snow. For removing hard drifts something besides brute force is required, and the application of correct mechanical principles to this problem resulted in the design and construction of "The Rotary." This type of plow is adapted to removing snow of any character and any depth, quickly, easily and with no danger to equipment or men. Its design is the result, also, of a desire to prevent the spreading of rails and breaking down of bridges.

With the advent of the Rotary, snow fighting apparatus became available rendering it possible to deal with drifts which the wedge plow was unable to handle. In short, the Rotary works with certainty and regularity in the worst snow conditions, affording great relief from the dangers surrounding the use of wedge-plows.

Twenty years of successful operation of the Rotary on the various railroads between the Atlantic and the Pacific has demonstrated the fact that it is the cheapest and only reliable means for removing snow from railroad tracks.

The first Rotary ever built was put into operation on the Union Pacific in 1887 and raised blockades on that road which had baffled all efforts for weeks before it arrived. During the month of February of that year this plow ran over 3,000 miles and handled snow, in some places fifteen feet deep, at a cost of sixteen and one-half cents per mile. This included the working expenses of both Rotary and pusher and the pay of the crews operating them. After its successful trial, this plow was immediately purchased by the Union Pacific Company, and there are now a large number of Rotaries in operation on that system. No better proof than this, of the great success of such an entirely new departure from anything previously attempted, could be furnished.



The Rotary at Work in Heavy Snow

—6—

Plaintiff's Exhibit D. Cause No. C.—50. [443D]

**[Defendant's Exhibit No. 1—Rule Issued by the
Copper River and Northwestern Railway Com-
pany.]**

Cordova, Alaska, July 16, 1910.

**TO ALL ENGINEERS, FIREMEN, HOSTLERS,
AND ALL CONCERNED:**

Do not fail to Extinguish *ALL* fire in ashes re-
moved from ash pans.

No excuse will be taken for the burning of ties, or
other damage to property, as a result of a failure to
do this. Engineers will be held equally responsible
with their firemen in this matter.

J. R. VAN CLEVE,
Superintendent.

Defendant's Exhibit 1. Cause No. C.—50. [443E]

[Defendant's Exhibit No. 2.]
Copper River & Northwestern Railway

Time Table No. 2

Taking Effect Sunday, Oct. 16, 1910, at 12:01
o'clock a.m.

Sitka or 135th Meridian Time

DESTROY TIME TABLE OF PREVIOUS DATE

This Time Table is for the Government and Information of Employees Only. The Company reserves the right to vary therefrom as circumstances may require.

E. C. HAWKINS,
General Manager.

J. R. VAN CLEVE,
Superintendent.

NORTH BOUND		COPPER RIVER & NORTHWESTERN RAILWAY				SOUTH BOUND	
FIRST-CLASS		Distance From Cordova Wharf	Time Table No. 2 In Effect Sunday, Oct. 16, 1910		Distance From Chitina	FIRST-CLASS	
Special Rules	1		STATIONS			2	Special Rules
	MIXED Leave Daily Except Sunday	0.0	CORDOVA (Wharf) 1.3	130.7	MIXED Arrive Daily Except Sunday		
	8:00 a.m.	1.3	CORDOVA (Second Street Station) 4.6 W. Y. T.	129.4	4:00 p.m.		
	8:13	5.9	EYAK RIVER 6.8	124.8	3:45		
	8:35	12.7	SHERIDAN 9.5	118.0	3:25		
	9:03	22.3	ALAGANIK 4.0 W.	108.5	3:00		
	9:15	26.2	FLAG POINT 12.3	104.5	2:50		
		38.5	KATALLA JUNCTION 2.4 W.	92.2			
	9:57	40.9	GOAT MOUNTAIN 7.7	89.8	2:10		
	10:20	48.6	MILES GLACIER 6.0	82.1	1:50		
	10:45	54.6	ABERCROMBIE 8.6 W.	76.1	1:25		
		63.2	MORaine 3.7	67.5			
	11:30	66.9	BAIRD RIVER 11.2	63.8	12:40		
12:05 p.m.	78.1	BREMNER 14.4 W.	52.6	12:05 p.m.			
12:30		CLEAVE CREEK 8.6	38.2	10:30			
1:20	92.5	TIEKEL 12.6 Y.	29.6	9:55			
1:55	101.1	URANATINA 10.7	17.0	9:10			
2:40	113.7	WOOD CANYON 6.3	6.3	8:30			
3:20	124.4	CHITINA W. Y.	0.0	8:00 a.m.			
3:45 p.m.	130.7						
	ARRIVE Daily Except Sunday				LEAVE Daily Except Sunday		
The clock in the Dispatcher's office, Cordova, is Standard Time.							
Bulletin Books are located in the Dispatcher's office, Cordova, and at Chitina.							
Register Stations: Cordova and Chitina.							
Trains will not exceed 15 miles per hour approaching and crossing the following bridges:							
Flag Point Crossing,							
On Mile 27.							
Round Island Channel,							
On Mile 28.							
Hot Cake Channel,							
On Mile 34.							
Miles Glacier Crossing,							
On Mile 49.							
NORTH BOUND TRAINS ARE SUPERIOR TO SOUTH BOUND TRAINS.							
Full face figures denote meeting or passing points							
ALL TRAINS MUST BE HANDLED UNDER ABSOLUTE CONTROL IN YARD LIMITS.							

Defendant's Exhibit 2. Cause No. C.—50. [443F]

**[Defendant's Exhibit No. 3—Letter Dated Cordova,
Alaska, June 3, 1912, R. W. Baxter to George
Geiger.]**

**COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY.**

SEATTLE, WASHINGTON.

R. W. BAXTER,
Vice-President.

June 3, 1912.

Mr. Geo. Geiger,
Superintendent,
Cordova, Alaska.

Dear Sir:—

We have been advised by the Interstate Commerce Commission that they will take charge of all railroads in Alaska August 1st, after which time it will be necessary for us to comply in all respects with the Commission's requirements and for your information and guidance am sending you under separate cover, one copy each of

Act to regulate commerce (as amended) and acts supplementary thereto, which include, Commerce Court Act, Safety Appliance Acts, Act requiring monthly report of accidents, Arbitration Act, Hours of Service Act, Boiler Inspection Act.....

Tariff Circular #18A and supplement #2 thereto and General Order #11.....

Conference Rulings Bulletin #5, with Supplement #1 thereto and other supplements, bring-

ing the Commission's conference rulings up to
date.....

Please acknowledge receipt of these publications,
advising that you will comply with the require-
ments of Commission.

Yours truly,

R. W. BAXTER,
J. J.

Defendant's Exhibit 3. Cause No. C.—50.
[443G]

*In the District Court for the Territory of Alaska.
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Order Allowing, Settling and Certifying Bill of
Exceptions.**

It appearing to the Court that the defendant has
prepared and duly served upon the attorney for the
plaintiff herein, within due time, a proposed Bill of
Exceptions, and the Judge of said court having duly
designated Thursday, the 17 day of July, 1913, as the
time at which he would settle the Bill of Exceptions,
and both parties having been informed of the time for
settling the Bill of Exceptions as designated by the

Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 17 day of July, 1913, and attorneys for both parties having been present:

It was thereupon, and is hereby ordered that the proposed Bill of Exceptions be allowed, the same shall be and is hereby settled and allowed as a Bill of Exceptions herein and presented to the Judge of this court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form, it is therefore [444] ordered that the said bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [445]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—50.

Mrs. E. A. REED, as Administratrix of the Estate
of J. E. REED, Deceased,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendant.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this the 17 day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, District of Alaska, 1st Division. Jul. 17, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [446]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the Territory of Alaska,
Third Division.*

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and hereto annexed 446 pages, numbered from 1 to 446, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the precept filed in my office on the 1st day of August, A. D. 1913.

That I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$190.50 has been paid to me by R. J. Boryer, Esq., one of the attorneys for the defendants and appellants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 2d day of August, A. D. 1913.

[Seal]

ARTHUR LANG,

Clerk. [447]

[Endorsed]: No. 2301. United States Circuit Court of Appeals for the Ninth Circuit. Copper River & Northwestern Railway Company, a Corporation, Plaintiff in Error, vs. Mrs. E. A. Reed, as Administratrix of the Estate of J. E. Reed, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed August 11, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWEST-
ERN RAILWAY COMPANY, a
corporation,

Plaintiff in Error,

vs.

MRS. A. E. REED, as Administratrix
of the Estate of J. E. REED, De-
ceased,

Defendant in Error.

No. 2301.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Brief of Plaintiff in Error.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

610 Central Building,
Seattle, Washington.

In the
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWEST-
ERN RAILWAY COMPANY, a
corporation,

Plaintiff in Error,

vs.

MRS. A. E. REED, as Administratrix
of the Estate of J. E. REED, De-
ceased,

Defendant in Error.

No. 2301.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Brief of Plaintiff in Error.

This cause comes here on a writ of error sued out by the defendant below, to reverse a judgment rendered against it in the court below for the sum of \$20,340.00, in an action at law for the recovery of damages for the death of one, J. E. Reed, husband of plaintiff, alleged to have been caused by reason of the negligence of defendant. For convenience in this brief, the parties will be referred to as designated in the court below.

The complaint (R. pp. 2-3) alleges that plaintiff is the duly appointed, qualified and acting administratrix of the estate of J. E. Reed, deceased, and that she sues as such for the use and benefit of herself, as his surviving widow, and her two minor children. That the defendant is a corporation doing business as a common carrier by steam railway in the Territory of Alaska, and was engaged in such business and operating its line of railway from Cordova, Alaska, into the interior of said territory at all times mentioned in the complaint.

The complaint further alleges that about January 1, 1912, and for some time prior thereto, said J. E. Reed was employed by defendant as a locomotive engineer, driving its engines over the railroad, as he was directed by the defendant; that on said date the defendant had negligently

“allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated, so as to render the same extremely hazardous to the said J. E. Reed, and

other employees of the defendant operating its said engines.”

That on or about said date, said Reed, pursuant to the duties of his employment, was driving an engine over the railway, and by reason of “the unsafe and hazardous condition of said track, said engine was derailed” and he was killed. Said complaint also alleges that deceased was thirty-one (31) years of age, in good health, and earning \$3,000.00 per annum; that he left him surviving the plaintiff, his widow, and two minor children, aged respectively, seven and two years, who were deprived of the support

“and care of a loving husband and father, and said children have been deprived of the education, training and nurture which only a father can give, and said plaintiff has been damaged in the sum of twenty-five thousand dollars.”

The answer (R. pp. 26 and 27) denies any knowledge as to the appointment of plaintiff as such administratrix; but it admits the incorporation of defendant, and that it was a common carrier as alleged, and it denies all other allegations of the complaint. For affirmative defenses, defendant pleaded that if said Reed was killed, his death

was caused by and arose out of and from risks incidental to his employment and business, which he assumed; also that it was caused by his own negligence and the negligence of a fellow-servant and those working with him.

The affirmative defenses of the answer were denied by a reply filed by plaintiff; and the issues as defined by the complaint, answer and reply came on for trial before Honorable Peter D. Overfield, judge of said court, and a jury, on April 30, 1913. At the close of the testimony defendant moved the court for a directed verdict, which motion was denied, and an exception taken by defendant and allowed. A verdict was rendered for \$20,000.00 in favor of plaintiff, but without any segregation as to the separate damage sustained by plaintiff as widow of deceased, and by his respective children. After the trial, defendant made a motion for judgment, notwithstanding the verdict, and a motion for a new trial, both of which motions were denied and defendant's exceptions thereto allowed.

There is practically no dispute as to the material facts in the case. It is alleged and admitted that at the time of the accident, defendant was a common carrier by steam railway in the Territory of Alaska, and there is no dispute that deceased

was in its employ at that time, as engineer of a rotary snow plow used upon its said railway line. This railway was then being operated between Cordova, on the southwestern coast of Alaska, and Chitina, about 130 miles toward the interior. During the winter months portions of this railway line were liable at any time to be blockaded by heavy snowfalls and slides. This was especially true of that portion of the road from Flag Point, Mile 26, to Tiekel (R. p. 24). The ordinary running time of trains from Cordova to Tiekel was about eight hours (R. pp. 151, 292-3; Defendant's Exhibit 2, R. p. 471), but at this time of the year, on account of weather conditions and snowslides, it was impossible to tell when leaving Cordova how long the trip would take or what conditions of weather or snow would be encountered (R. pp. 67, 151, 292-3, 327).

About 12:45 o'clock P. M. on December 30, 1911 (R. p. 200) a rotary snow plow pushed by two steam locomotives, with caboose attached, left Cordova, ahead of a combined freight and passenger train, bound for Tiekel, which was the next terminal (R. pp. 148, 163, 209, 328), and about 101 miles from Cordova. The crew of this rotary on this trip consisted of Engineer Reed, who had supervision over,

charge of and was responsible for the rotary and those employed on it(R. pp. 192, 263-264, 274, 285-290, 301, 322-324); also witness Albright, who was fireman, and had been working under Reed for about three weeks, who instructed the fireman in his duties and as to the company's rules and regulations (R. pp. 263-4); also witness Holden, who was the pilot, and witness Taylor, who was watchman for the "Rotary Fleet" (R. p. 244).

The snow plow was sent ahead to clear the track of snow. At that time defendant had only two rotary snow plows, a large one known as "X2" and a small one known as "X1." The large rotary was taken out from Cordova at first on this trip. On account of the heavy snow encountered it took until about eight or nine o'clock that evening to reach Mile 52 (R. pp. 106, 162-3). At this point the rotary became disabled so it could not work (R. pp. 108, 178, 201, 254). Both the regular train and rotary train backed up to Mile 39, where there was a water tank (R. p. 110), arriving there about 9:35 o'clock that evening (R. p. 201), where they waited until the other rotary was sent out from Cordova. The small rotary arrived at Mile 39 at 3:30 o'clock the morning of December 31, 1911, and all then went to Mile 49, which was the only place the dis-

abled rotary could be turned around to be sent back to Cordova (R. p. 111). Here the small rotary was turned over to the crew of the large rotary and placed in the rotary train, while the crew which had brought the small rotary out from Cordova took the disabled one back (R. p. 112).

The rotary train then proceeded ahead of the regular train toward their destination at Tickle (R. p. 207). They passed bridge 75-A and stopped about half a mile or so beyond this bridge on account of a heavy snow drift encountered (R. pp. 113, 171, 183). It was here found that the rotary required water, and after ineffectual attempts were made to take water for it from the other engines, it was decided to back down to bridge 75-A and there syphon water from the stream. This was done, the regular train and rotary train all backing to this bridge, which they reached between 9 and 11 o'clock the evening of December 31 (R. pp. 113, 164, 171, 213).

This bridge was about ten feet from the ice of the stream below, and about the length of the rotary and two pusher engines. The regular train, therefore, was compelled to back clear across the bridge. The bridge was constructed on standard piling, five piles to the bent, across the pile bents were four-

teen-inch caps, and on top of these caps there were three eighteen by eight stringers on each side, set on edge, with a four-inch space between each stringer. These stringers ran lengthwise of the bridge. On top of the stringers were the ties with a five-inch space between, and the rails rested on these ties (R. pp. 270, 308, 311). The rotary train stopped on the bridge, the rotary stopping near the north end and the last engine stopping just off the other end (R. pp. 184, 194). The engine next the rotary stopped on the bridge. They remained here about an hour and a half, syphoning water into the rotary (R. p. 257).

While on the bridge, Fireman Albright of the rotary, cleaned out the ash pan of the rotary on the timbers of the bridge (R. pp. 259, 265, 266). Before doing this, Albright told Engineer Reed that he was going to clean out the pan (R. pp. 267, 268), and after he had cleaned it out he told Reed that he had done so, and Reed said: "Are you sure that the ashes are all off the bridge?" (R. pp. 260, 269), and Albright said they were. No ashes from the other engines were cleaned here (R. pp. 185, 221).

The rules of the company, then in force, provided as follows:

“To all Engineers, Firemen, Hostlers and All Concerned:

“Do not fail to extinguish all fire in ashes removed from ash pans.

“No excuse will be taken for the burning of ties, or other damage to property, as a result of a failure to do this. Engineers will be held equally responsible with their firemen in this matter.” (R. pp. 195, 301.)

These rules were in the dispatcher's office at Cordova, in the bulletin books of the Company, referred to in the Company's time table (Defendant's Exhibit 2; R. pp. 195, 301), and were known to, or should have been known to Reed, who was an experienced engineer, and had been working as such on this railway for about two years (R. pp. 138, 288, 299).

After taking water and cleaning the ash pan, the rotary train backed across the bridge and took on some coal, which the regular train had unloaded for it on the snow alongside the track, and then both trains proceeded north toward Tiekel, where they arrived at 5:45 the morning of January 1, 1912 (R. pp. 209, 210). Here, the watchman, Taylor, and Fireman Scott and Conductor Wilson took

the train to Mile 105 for water, turned it and tied it up, the crew all going to bed shortly after their arrival at Tiekel (R. pp. 165, 211, 227, 229).

The great length of time consumed on this trip was caused by the great quantity of snow encountered, except the delay waiting for the second rotary to come out from Cordova and the delays in taking water. On account of the liability of the trains becoming storm-bound if they tied up at any point between Cordova and Tiekel, the next terminal, it was necessary that the trains keep moving as much as possible until they got through (R. pp. 67, 68, 88). There were no stations between these two terminals where it would have been safe or practicable to have tied up these trains with all their employees and passengers aboard.

At Tiekel these trains met a train which came down from Chitina with passengers for Cordova, and the crews of the rotary train and regular train were called at 1 o'clock P. M. on January 1st, and both trains then left with their passengers on the return trip to Cordova, the rotary ahead (R. p. 201). The trains proceeded slowly, about seven to nine miles an hour (R. p. 97), and when they reached bridge 75-A, about 7:30 o'clock that evening, the rotary which was ahead suddenly lurched to the

right, and went off the bridge, killing Engineer Reed.

An examination of the bridge after the accident showed that it had been burned (R. pp. 64, 79, 101, 203, 308-317). The cords or stringers on both sides of the bridge were burned. The fire had run along on the inside of the stringers on both sides of the bridge, but on the left-hand side, the way the rotary was going when it went over, the fire had not burned the stringers out as far as it had on the other side. On the side the rotary went over two piles were burned off at the bottom flush with the ice, and there were a pile of coal, cinders and ashes left around these two piles, which showed that the ashes cleaned from the pan of the rotary had fallen around these piles. The fire on this side had burned the stringers about sixteen feet back, and thirty-five or forty feet ahead of these piles, and they were almost destroyed.

We do not think it will be questioned that the bridge was burned from the ashes from the rotary, which Fireman Albright cleaned on the bridge. No other ashes were dumped on the bridge. No other trains had crossed the bridge since these ashes were dumped there, except these two trains going up after the rotary was watered and coaled, and there

is no evidence that any fire was dropped on the bridge by any of these engines. While it may be argued that coals from these engines might have been dropped on the bridge when the trains went north after the rotary was watered, there is not a particle of evidence of that fact, nor any evidence or claim that there was any defect in the ash pans of any of these engines, which would permit ashes to drop therefrom. It may be argued that the ashes were dumped from the rotary on the opposite side of the bridge from where the principal burn was, and the rotary went off. But the uncontradicted evidence is that both sides of the bridge were burned, and that the wind was blowing from the side of the bridge where the ashes were dumped toward the other side (R. pp. 141, 313, 314), and that the pile of coals, cinders and ashes from the engine was around the piles on the other side where they had been pushed off the bridge by the fireman. The ashes were raked out of the ash pan of the rotary onto the bridge, over the right-hand rail, as the rotary then stood; and, while the fireman testified that he pushed the ashes and coals off the bridge, he admitted that he did not turn any water on them, and that it was dark, and, of course, he could not tell whether or not there were any live coals among the ashes, or whether or not they fell around the piles

of the bridge, or whether any of them remained on any of the timbers of the bridge. We think, therefore, the court will be satisfied from a reading of the evidence, that the coals dumped from this rotary by the fireman, with the knowledge of the deceased engineer, set fire to the bridge and caused the accident.

It is alleged in the complaint that the ties were "burned and destroyed by ashes and cinders, negligently allowed by the defendant to be *dumped* upon the roadbed." It was also alleged that the defendant suffered its roadbed otherwise to become unsafe and unfit for the operation of locomotives over it, but there is no evidence that the roadbed was unsafe in any particular except from the fact of its being burned from these ashes.

Over the objections of defendant (R. pp. 59, 86, 87) the court permitted plaintiff to offer evidence that the Federal Act relating to the hours of service of railroad employees had been violated, and it charged the jury in effect that if they found defendant had violated this law, it would be liable. No allegation of negligence in this respect was contained in the pleadings, and we shall argue that this evidence was inadmissible under the pleadings, and that in any event the evidence does now show a

violation of that law, nor that the length of time deceased, or Fireman Albright, or any of defendant's employees had been working prior to the accident, in any way contributed thereto.

The questions involved in this Statement of Facts, and presented here by the Assignment of Errors, together with the manner in which these questions are raised on the record, are as follows:

I.

Defendant will contend that no negligence is shown, either as alleged or otherwise, and therefore there could be no recovery in this case.

This question is raised upon the record by Assignment of Errors Nos. 24, 26, 27, 29, 38, 39, 40, 41, 42, 47, 50 and 51.

II.

That deceased assumed all the risks of injury from the bridge burning on account of ashes coal and cinders dumped thereon by the fireman under his control, and for whose actions he was responsible, and therefore there could be no recovery in this case.

This question will be raised upon the record by

Assignment of Errors Nos. 24, 26, 35 to 46, inclusive, 48 to 51, inclusive.

III.

That the negligent acts of deceased in permitting his fireman to dump the ashes, cinders and coal from the rotary upon the bridge, and in not putting out all fire in such ashes, coal and cinders, as required by the rules of the Company, was the sole, proximate cause of the accident, and therefore no recovery could be had in this case.

This question will be raised upon the record by Assignment of Errors Nos. 24, 27, 29, 30, 32, 34 to 42, inclusive, 44, 45, 48, 49 50 and 51.

IV.

That the trial court committed prejudicial error in receiving evidence, over defendant's objection, of a violation of the hours of service law, and in instructing the jury that they might find negligence on the part of the defendant under the pleadings and evidence because of a violation of that law.

This question will be raised upon the record by Assignment of Errors Nos. 8, 12, 13, 14, 15, 19, 26, 31, 32 and 34.

V.

That the trial court committed prejudicial error in instructing the jury that they might find negligence on the part of the defendant under the pleadings and evidence if it failed to provide a track walker or inspect the track in question.

This question will be raised upon the record by Assignment of Errors Nos. 25, 26, 27 and 33.

VI.

That the trial court committed prejudicial error in its instruction to the jury as to the measure of damages in this case, and as to what they might take into consideration in determining such damage.

This question will be raised upon the record by Assignment of Errors No. 28.

VII.

That the verdict should have found the separate damage of plaintiff as widow of deceased, and of each of the children of deceased, instead of one lump sum for all, and therefore, the judgment based thereon cannot stand.

This question will be raised upon the record by Assignment of Errors No. 51.

VIII.

That the verdict is excessive, and was given and rendered under the influence of passion and prejudice, and is against the law and the evidence.

This question will be raised upon the record by Assignment of Error No. 51.

SPECIFICATIONS OF ERRORS RELIED UPON.

8.

The court erred in permitting witness Henry Lee to testify relative to train crews and rotary crews being continuously on duty since leaving Cordova and overruling of exception of plaintiff in error, which was duly excepted to and exception allowed, which testimony was as follows:

“Q. MR. COBB: Now, tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova?”

“A. Yes, sir.”

MR. BORYER: "I object to that—make the same objection."

Objection overruled. Defendant allowed an exception.

MR. COBB: "This is preliminary and I think it is something new."

"Q. Were you out on the trip of the 28th?"

MR. BORYER: "We object to that for the reason that it is incompetent, irrelevant and immaterial and tends to prove nothing under the issues."

Objection overruled. Defendant allowed an exception.

"A. Yes, I left Cordova on the 28th."

"Q. How long were you out on that trip?"

"A. The time shows 24 hours between Cordova and Mile 39."

"Q. Now, wasn't that the trip—I am not sure but I want to get at it—that the rotary was broken?"

"A. No, this was another rotary that was broken."

“Q. Was there a rotary broken on that trip?”

“A. There was a rotary broken on this trip also.”

“Q. On the trip of the 28th?”

“A. I think so, yes.”

“Q. Where did the little rotary come from that was sent up to relieve the one that was broken at Mile 39 or 53 on the trip of the 30th?”

“A. A little rotary came from Cordova.”

“Q. It was sent out from Cordova?”

“A. Yes, sir.”

“Q. When you reached Tiekel, how many hours had you been continuously on duty up to the time that you went off duty—how many continuous hours on that trip going up?”

MR. BORYER: “We object to that as incompetent and irrelevant and tends to prove nothing under the issues.”

Objection overruled. Defendant allowed an exception.

The court erred in permitting witness Henry Lee, over the objections and exceptions of plaintiff in error duly allowed, to testify regarding running time on trip of December 28th and the number of hours continuously on duty, duly excepted to and exceptions allowed, which testimony is as follows:

“Q. MR. CORR: Coming back to the beginning of this trip—were you on the trip on which this train left here on the 28th of December, 1911?”

MR. BORYER: “We object to that as incompetent and irrelevant and tends to prove nothing under the issues and simply burdens the record.”

By the COURT: “It has already been testified to. Unless it is something different than he has already testified to, the objection will be sustained. I let you go back to the 25th.”

The court erred in sustaining defendant in error exception to questions asked witness Henry Lee regarding objection to hours worked, to which

exception was taken and allowed, which questions were as follows:

“Q. MR. BORYER: Did you raise any objection to going, to taking that trip out that morning?”

MR. COBB: “We object to that as irrelevant and immaterial.”

Objection sustained. Defendant allowed an exception.

14.

The court erred in sustaining defendant's in error objection to witness Henry Lee testifying regarding work, which was duly excepted to and allowed, and which question was as follows:

“Q. MR. BORYER: I will ask you if you have ever worked over the required time as provided by law, and the service hour law, since September 1, 1912?”

MR. COBB: “Same objection.”

Objection sustained. Defendant allowed an exception.

19.

The court erred in refusing to permit plaintiff in error to show that the crew on the northbound train proceeded north from Miles Glacier or the halfway point between the two terminals—Cordova and Tiekel—willingly with the rotary that was working rather than attempt to return to Cordova with the broken rotary, to which refusal plaintiff in error excepted and exception allowed, which offered testimony was as follows:

“Q. MR. BORYER: Now, when X1 met you at Miles Glacier was there any of the crew that wanted to come back home that you know of?”

MR. COBB: “We object to that as irrelevant and immaterial.”

“Q. Did any of them raise any protest as to going any further?”

MR. COBB: “We object as irrelevant and immaterial.”

Objection sustained. Defendant allowed an exception.

“Q. I will ask you if they did not proceed willingly, northbound?”

Same objection.

By the COURT: "I consider it makes no difference under the law whether the employees wanted to work or not."

Defendant allowed an exception.

24.

The court erred in denying motion of plaintiff in error for directed verdict, for the reason that the evidence of plaintiff shows that the plaintiff Reed was killed by reason of the burning of bridge 75A, that this bridge was burned by reason of the pan of the rotary being dumped on this bridge, that Reed was in charge of the rotary and the fireman who cleaned this pan on the bridge saw him clean the pan on the bridge, knew it was dangerous and against all rules and orders to clean pans on the bridges, and having cleaned and known that the rotary pan was cleaned on the bridge, violated the further rule of failing to see to or extinguish his fires dumped on the bridge, which rule was made for the safety of employees and passengers—to which *ruling duly* excepted and exception was allowed.

25.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“Was the cause of the death of Reed due to a negligence on the part of the defendant company in some duty reasonably imposed upon it, to be exercised by it in maintaining proper inspection of its road and roadbed, bridges and track and for which duty the defendant company is liable.”

26.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to or for the death of any of its employees, that such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed :

Instruction :

“It is the duty of a railroad company to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating its train and engines over such road; and a failure of the railroad company to exercise reasonable and ordinary care in that respect is negligence which will render the company liable for all damages to an employee, or if killed, to his personal representative, for injuries resulting from such negligence. This duty to keep and maintain its roadbed, track and ways in safe condition is not satisfied merely by constructing it safe to begin with, but it is the duty of the company to have the track and ways watched and inspected at sufficiently reasonable intervals as to discover and repair or guard against defects aris-

ing from the operation of the road which would endanger the lives and persons of its employees operating its trains and engines over the same, and a failure to exercise ordinary care in that respect is negligence. If you find and believe from the evidence in this case that J. E. Reed was in the employ of the defendant as an engineer on or about January 1st, 1912, and that while so employed the engine upon which he was at work was derailed and he was killed, and that the accident in which he was killed was caused by the negligence of the defendant in failing to keep its roadbed, track or ways in a reasonably safe condition, then your verdict should be for the plaintiff."

28.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"If you find for the plaintiff under the instructions given you, you will determine the amount of your verdict. In arriving at this amount you will assess the damage at such sum as will compensate the plaintiff and her minor

children for their pecuniary loss resulting from the death of the husband and father. In estimating this loss it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that capacity with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority.”

29.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are instructed that the defendant company is a common carrier by railroad; that as such it is liable in damages to the plaintiff and her two children for the death of J. E. Reed if such death you find resulted in whole or in part from the negligence of any of the defendant’s officers, agents or employees, or by reason of any defect due to the said defendant company’s negligence in its roadbed, bridge or ties or track at point of bridge 75A on said defendant company’s railroad on January 1, 1911.”

30.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are further instructed that the defendant company would be none the less liable under the foregoing instruction if you find that the said J. E. Reed may have been guilty of contributory negligence in causing the condition at Mile 75 which resulted in his death, but you are further instructed in this connection that if you should find that the negligence of J. E.

Reed contributed to the cause of his death, the damages, if any, resulting should be diminished in proportion to the amount of negligence attributable to the said J. E. Reed in causing his death.”

31.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are instructed that the act of March 4, 1907, passed by the Congress of the United States and applicable to the defendant company, its officers, agents and employees engaged in the transportation of passengers or property by railroad in the Territory of Alaska, provides that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until

he has had at least ten consecutive hours off duty and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having at least eight consecutive hours off duty, provided that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employee at the time said employee left a terminal and which could not have been foreseen, and provided further that the provisions of this act shall not apply to the crews of wrecking or relief trains. You are further instructed that this act became effective and in full force and effect on March 4, 1908."

32.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are further instructed that if at the time of the death of J. E. Reed the defendant

company was guilty of violating the statute of the United States providing that employees of its railroad should not be employed in any one day of twenty-four hours more than sixteen consecutive hours, without providing a rest of eight hours, and you further find the breach of this law by defendant in any way contributed to the injury and death of Reed, and then if you further find under the last above hereinbefore instruction that the said J. E. Reed was guilty of contributory negligence with the defendant company in causing his death, then the said contributory negligence of the said J. E. Reed, if any, should not be considered by you in assessing the damages, if any, against the defendant company in favor of the plaintiff and her children herein.”

33.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

“You are instructed that if you find the deceased was guilty of contributing by his negligent acts in dumping or knowingly permitting

his fireman to dump and leave unextinguished cinders and ashes from his rotary on the bridge in question, and that this caused the death of J. E. Reed, yet if you further find that the defendant company was subsequently and before the time the rotary fell through the said bridge on January 1, 1912, negligent in not providing through its proper agents and employees the presence of a track walker to inspect the said road at the point in question, at bridge 75A, and you further find that such track walker was not so engaged by said defendant company and the presence of such track walker would naturally have discovered the condition of the bridge in time to have prevented the accident on January 1, 1912, then the said defendant is liable and your verdict must be for the plaintiff."

34.

The court erred in giving the following instruction, to which plaintiff in error excepted and its exception was allowed:

Instruction:

"You are instructed that if you find the defendant company was in no way negligent in

its duties to its employees and to the deceased, and the injury to the said deceased occurred alone by reason of deceased's own negligence or the negligence of his fellow-servants, then your verdict must be for the defendant, unless you further find that the defendant was guilty of a violation of the labor hour laws as hereinbefore set out and such violation contributed to the injury of the deceased."

35.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the rules of the Copper River & Northwestern Railway Company required the deceased to extinguish all fire in ashes removed from ash pans of his engines or rotary and the fire removed from the engine or rotary was not extinguished and this fire was the cause of the roadbed being out of repair and the ties burned and destroyed by reason of same having been dumped upon the roadbed at the point or place where the deceased

was injured, then you are instructed that the deceased assumed the risks of not seeing that the fire was out and cannot recover in this case.”

36.

The court erred in refusing to give to the jury the following instruction required by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if the Copper River & Northwestern Railway Company’s roadbed was out of repair, the ties burned and destroyed by ashes and cinders by being dumped upon the roadbed and said deceased knew that ashes and cinders had negligently been allowed to be dumped upon the roadbed, which ashes and cinders caused the ties to be burned and destroyed by ashes and the roadbed made unsafe, you are instructed that the plaintiff cannot recover in this case.”

37.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in

error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that it was the duty of the deceased in this case to obey all rules and regulations of the Copper River & Northwestern Railway Company and that if the deceased failed, neglected or refused to obey said rules and his injury was caused by reason of the deceased failing, neglecting or refusing to obey said rules, the deceased was guilty of contributory negligence.”

38.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased, J. E. Reed, was engineer of the rotary and as such engineer, he has charge of the rotary, and as such engineer he is responsible for the conduct and acts of the fireman and from the evidence you find that the

fireman of the rotary dumped or cleaned the pan of the rotary on the bridge and that this was the cause of the unsafe condition of the roadbed, then you are instructed that the deceased cannot recover in this action."

39.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that it was the duty of the deceased to know the contents of the time table in use on the road at the time of the accident to him and a time table was in use and that said time table contained certain special rules, one of which stated where the bulletin books are located, and it was the duty of the deceased to examine the bulletin books and said bulletin books were accessible and contained a bulletin that required the deceased to extinguish all fire in ashes removed from ash pans, and you find that deceased failed to extinguish all fire removed from the ash pan of his rotary and that his failure

to extinguish or see that it was extinguished caused the bridge to burn and make the roadbed unsafe and this was the cause of J. E. Reed's death, then you are instructed that the deceased was guilty of negligence for which the defendant, Copper River & Northwestern Railway Company, cannot be held liable."

40.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence."

41.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if the deceased, being a man of mature age and experience in railroading, knew or by the exercise of ordinary railroad experience and intelligence, that it was dangerous to dump or allow to be dumped from his rotary the pan on the bridge and that the bridge was made unsafe by reason of the pan from his rotary being dumped on the bridge and he was injured by reason of the unsafe condition of the bridge, caused by the dumping of the pan of his rotary on the bridge, then you are instructed that the deceased was guilty of negligence and cannot recover in this action.”

42.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased as engineer of the rotary is responsible for the acts of the fireman and the fireman of his rotary cleaned the pan of the rotary on the bridge and it was dangerous to clean the pan on the bridge and the bridge was made unsafe by reason of the pan having been cleaned thereon and the deceased met his death by reason of the unsafe condition of the bridge caused by the pan being cleaned thereon, then you are instructed that the deceased was guilty of negligence and cannot recover in this action.”

43.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased knew that the fireman on the rotary cleaned his pan on the bridge, which was made unsafe by reason of the

fireman cleaning his pan on the bridge and the deceased met his death by reason of the fireman cleaning his pan on the bridge and failing to extinguish all fire from the ashes of the pan cleaned on the bridge, then you are instructed that the deceased assumed all of the risks and hazards arising from or by reason of the pan being cleaned on the bridge."

44.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

"You are instructed that if you find from the evidence that the deceased had charge of the rotary and had supervision over the fireman and is responsible for the acts of the fireman in connection with the fireman's work around and upon the rotary, and you further find that the fireman of the rotary cleaned his pan on the bridge and by reason of having cleaned the pan on the bridge, the bridge was made unsafe and the deceased met his death by reason of the unsafe condition of the bridge, then you are in-

structed that deceased cannot recover in this action.”

45.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased was in charge of the rotary and as such had supervision over the fireman and that it was the deceased’s duty to see that the fireman extinguished all fire in ashes removed from the ash pan on the rotary and the deceased failed or neglected to do this, and by reason of the deceased’s failure to see that the fireman extinguished all fire and he met his death by reason of failure to see that the fireman extinguished all fire, then you are instructed that the deceased was guilty of negligence and plaintiff cannot recover in this action.”

46.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in

error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased’s injury was caused by reason of negligence of the fireman of a fellow-servant of the deceased, that he cannot recover in this action.”

47.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that the burden is upon the plaintiff to establish her cause of action by a preponderance of evidence and cannot recover unless she proves by the preponderance of evidence not only that the defendant, Copper River & Northwestern Railway Company, was negligent, but must also prove that the defendant’s negligence contributed to the cause of the injury to the deceased and if she fails to establish these facts by the preponder-

ance of the evidence, the plaintiff cannot recover.”

48.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that it was the duty of the deceased, J. E. Reed, to be conversant with the rules of the Copper River & Northwestern Railway Company pertaining to the running and operating of the rotary, including rules regarding the extinguishing of fire from the ash pan of his rotary.”

49.

The court erred in refusing to give to the jury the following instruction requested by plaintiff in error, to which refusal plaintiff in error duly excepted and its exception was allowed:

Instruction:

“You are instructed that if you find from the evidence that the deceased, J. E. Reed, disobeyed any rule of the Copper River & North-

western Railway Company and he was injured or killed by reason of his disobeying said rule or rules, you are instructed that the plaintiff cannot recover in this action.”

50.

The court erred in denying the motion of plaintiff in error for judgment in this case in its favor and against said plaintiff, notwithstanding the verdict rendered in said cause, to which plaintiff in error excepted and its exception was allowed.

51.

The court erred in denying the motion of plaintiff in error for a new trial and in its order and judgment overruling such motion and granting judgment in favor of plaintiff for the amount of the verdict found by the jury in favor of plaintiff, with costs, which order and judgment was duly excepted to by defendant and its exception allowed by the court. Said motion was based on the files and records and proceedings herein, and was made upon the following grounds specified therein and on each thereof, to-wit:

I.

“Insufficiency of evidence to sustain or justify the verdict in the following particulars:

A. “That the jury was not justified in finding defendant guilty of any negligence as alleged by the plaintiff nor in finding against said defendant.

B. “In that plaintiff based her cause of action because on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed. That the plaintiff had agreed and stated that the words ‘and otherwise suffered to become utterly unsafe and unfit as a roadbed’ applied to said ties being burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed.

C. “That the plaintiff’s witnesses admitted that on the night of December 30th, 1911, the plaintiff’s deceased husband was in charge of and had charge over Rotary X1, that the fire-

man of this rotary was under the supervision and instructions of the deceased husband, who was engineer and had charge of said rotary; that the fireman of this rotary against the rules and orders of the defendant company cleaned or dumped the ash pan of his rotary on bridge 75A, which bridge was destroyed by fire by reason of the ashes being dumped from said rotary on the day of January, 1912; that the plaintiff's deceased husband was killed by reason of the fire of said bridge caused by reason of the ash pan of said rotary being dumped or cleaned on said bridge, which act was against a known rule of the company and the further known rule that required the plaintiff's deceased husband to extinguish all fire from ashes removed from ash pan at any and all places."

II.

A. "That plaintiff's witnesses admitted that they left Cordova on the 30th of December, 1911, the first terminal of the Copper River & Northwestern Railway Company, or the defendant, and that the second or next terminal of defendant company is located at Tiekel or Mile 101 beyond a point where Bridge 75A is

located; that said bridge being located on Mile 76 and being between the terminal at Cordova and Tiekel.

B. "That the plaintiff's evidence shows conclusively that the reason they were delayed and required to be on duty from the time they left Cordova until they reached Tiekel was because that the rotary that they started from Cordova with met with an accident which necessitated repairing said rotary and returning it to Cordova, and that they were required to await the arrival of another rotary from Cordova, and that during all of the time between said terminals they were on a single track and were fighting snow, and that it was dangerous to stop said rotary while fighting snow, for the reason that a snow or wind would possibly snow them in and delay them for an indefinite time; that said railroad of the defendant is a single track from Cordova, its first terminal, and Tiekel, its second terminal. That the acts which required said employees to be on duty for the time that they were on duty was caused by casualties and unavoidable accidents and the act of God and could not have been foreseen by the defendant, and that said delay was not the result

of a cause known to the carrier or its officers, agents in charge of said employees at the time said employees left the first terminal nor which could have been foreseen by the defendant."

C. "That the plaintiff's witness, Albright, who cleaned the ash pan on the bridge, which fire caused the bridge to burn that caused the death of plaintiff's husband, admitted that the reason he violated the rule of cleaning his fire on the bridge and the further rule of seeing that all fire from ashes removed from ash pan is extinguished, was because they wished to save time, and for the further reason that if he cleaned the pan off of the bridge he would have been required to shovel some snow from the side of the track so that he could use his hoe for the purpose of cleaning out his pan."

III.

"That Bridge 75A was shown to be a safe bridge from the evidence for the reason that this rotary with its engines on the night before the accident to the plaintiff's deceased husband had crossed this bridge several times; that there were not any evidence in this case to show that a track walker or section man is necessary over

that particular portion of the road, nor does the law require that the defendant keep a track walker or section man for the purpose of seeing that engineers or trainmen obey rules and orders."

IV.

"That the verdict is against the evidence and law."

V.

"That the amount of damages allowed in this case is excessive and was influenced by passion or prejudice."

VI.

"Errors of law occurring in the trial and exceptions made by the defendant."

VII.

"Accident or surprise by which ordinary prudence could not have guarded against."

VIII.

"In denying defendant's motion for a directed verdict."

IX.

“That the plaintiff bases the accident upon the following negligence as alleged in her complaint in paragraph 3, which is as follows: ‘That on the first day of January, 1912, defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders negligently allowed by defendant to be dumped upon the roadbed and otherwise suffered to become utterly unsafe and unfit as a roadbed,’ it being ruled by this court on a motion to make more definite and certain, and being agreed by attorney for plaintiff that the following words: ‘and otherwise suffered to become utterly unsafe and unfit as a roadbed,’ referred to ashes and cinders being negligently dumped upon the roadbed. That the plaintiff against the objections of the defendant and exceptions taken introduced in evidence matters relating to track walkers and hours of work performed by the crews of the rotary and other engines pushing the rotary and the train crews on the local train, of the trip of said rotary and trains from the time they left Cordova terminal on the 30th of December, 1911, up until the night of the accident, Jan-

uary 1, 1912. That the pleadings and issues as made up in this case do not allege or in any way refer to such facts as would permit the defendant to anticipate that such evidence would be brought out or introduced or that the plaintiff was basing her cause of action partly on such acts and facts."

X.

"For the further reason that the instructions given on page 3 require that the jury consider whether J. E. Reed met his death by reason of the negligence of the defendant company in failing to maintain and inspect its road, and roadbed, bridges and track, that the law does not require the defendant to maintain and keep inspectors of roadbed, bridges and track until it has been shown by the plaintiff that such was necessary, and in no event does the law require the defendant to keep inspectors for the purpose of inspecting the roadbed and bridges for the safety of one who violates a rule and by violating said rule makes the roadbed or bridge unsafe."

XI.

“For the further reason that the court, on page 5 of its instructions, instructed the jury that in any action brought against any common carrier under or by virtue of any of the provisions of the Act referred to on said page, to recover damages for injuries to or for the death of any of its employees, that such employees shall not be held to have assumed the risks of his employment in any case where the violating of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

“That there are no allegations in the complaint and no evidence in the case to the effect that the said J. E. Reed met his death by *by* reason of the defendant violating any statute enacted for the safety of employees which contributed to the injury or death of the said J. E. Reed, and for the further reason that it was shown by the evidence that all work performed by the said J. E. Reed and other employees of the rotary crew and train crews was performed on a single track railway between Cordova, their starting terminal and the next terminal at Tiekel or Mile 101, and that the cause of the

death of J. E. Reed was the burning of the Bridge 75A on Mile 75, the fire of which was caused by the deceased *permitted* his fireman to clean his rotary pan on this bridge, and for the further reason that he did not require or did not put out or extinguish all fire from ashes dumped from this pan onto the bridge, which is contrary to the rules of the company, and plaintiff's evidence shows that the reason he dumped or cleaned his pan on this bridge was because he wished to save time and so he would not be required to shovel some snow from the side of the track where he could stand so as to pull his fire."

ARGUMENT.

NO NEGLIGENCE IS SHOWN AS ALLEGED OR OTHERWISE.

This action is based upon the Federal Employers' Liability Act. While the Act is not mentioned in the complaint, nevertheless, allegations are there made and evidence was introduced thereunder which showed that the Act applied, and the action was tried and submitted to the jury upon that theory. The liability of defendant, therefore, if any, must be determined with reference to that Act.

DeAitley vs. C. & O. R. Co., 201 Fed. 591.

Kelley's Administrator vs. C. & O. R. Co., et al., 201 Fed. 620.

Michigan Central R. Co. vs. Vreeland, 45 Sup. Ct. Dec., February 15, 1913, page 192.

Adams Express Co. vs. Croninger, U. S. Sup. Ct. Dec., February 15, 1913, page 148.

Winfrey, etc., vs. N. P. R. Co., U. S. Sup. Ct. Dec., March 15, 1913, page 273.

Second Employer's Liability Cases, 223 U. S. 1.

Garrett vs. L. & N. R. Co., 197 Fed. 715.

Smith vs. D. & T. S. L. R. Co., 175 Fed. 506.

Cound vs. A., T. & S. F. R. Co., 173 Fed. 531.

Erie R. Co. vs. White, 187 Fed. 556.

McChesney vs. Illinois Central Ry. Co., 197 Fed. 85.

Section 2 of the *Federal Employer's Liability Act* provides that a common carrier by railroad in a territory shall be liable in damages for a death of one of its employees, which resulted "in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." These provisions being in derogation of the common law must be strictly construed.

Fulghan vs. Midland Valley Co., 167 Fed. 660.

Johnson vs. S. P. R. Co., 196 U. S. 1.

It will be seen that this Act makes the carrier liable for a death in two instances. First, where the same results in whole or in part from the negligence of any of the officers, agents or employees of such a carrier, and second, where it results by reason of any defect or insufficiency, *due to its negligence*, in its track, roadbed, etc.

It is not alleged in this case that the death of plaintiff's husband was caused by the negligence of any of the officers, agents or employees of defend-

ant, and no recovery can be had upon any ground of negligence not alleged in the complaint. The negligence alleged is that defendant had negligently

“allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated,”

and it is alleged that this unsafe and unfit condition of the roadbed was not due to any fault or negligence on the part of the deceased. This is not an allegation of any negligent act on the part of any officer, agent or employee of the defendant, but is an allegation of negligence on the part of the defendant itself, which brings the case under the second ground of liability named in the statute. However, we do not think any recovery can be had in this case either on the ground of negligence of an officer, agent or employee of the defendant, or of negligence on its part in permitting or allowing its roadbed or track to become unsafe as alleged.

There can be no dispute as to the sole cause of the accident in this case, which was the act of Fire-

man Albright of the rotary, in cleaning the ashes, cinders and coal out of the rotary ash pan on the bridge in question, and in failing to put out all fires in such ashes, coal and cinders. There is not a particle of evidence in the case from which the jury could say that the bridge was burned from any other cause, and as plaintiff alleged that it was burned on account of ashes dumped on the bridge, and proved that the ashes were dumped on the bridge, and the bridge was burned thereafter, and did not show any other cause for the fire, it must be taken as conclusively shown that this was the sole cause of the bridge burning.

We contend that even if the complaint alleged that the accident was caused by the negligence of Albright in dumping the ashes on the bridge, and not putting out the fire in them, no case has been made against defendant under that portion of the Federal Act.

We do not think it will be disputed that this provision of the act does not make the carrier an insurer, in favor of its employees, against the negligent acts of fellow employees. The purpose of this provision of the statute is to take away the defense of negligence of a fellow servant, in those cases where at common law such negligence would defeat

an action. Those acts of negligence of a fellow servant which, at common law, would be imputable to the master except for the fellow servant rule, are the acts for which the carrier is made liable by this provision of the statute. But any act of negligence of a fellow servant which would not, at common law, be imputable to the master, is not such act of negligence as he is made liable for by this provision of the statute. We think this is recognized by the decision of the Supreme Court of the United States in the Second Employer's Liability Cases, 223 U. S. 1, where the court says:

“ * * * the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as *was done at common law when the injured person was not an employee.*”

In this case, at common law there could be no liability on the part of the defendant for the act of negligence of Albright, independent of the fellow servant rule, for the reason that in no sense was his

act the act of defendant. If it had been committed by a person not an employee of defendant, under the evidence in this case, there could be no liability because the act was not defendant's act, and no negligence on account thereof could be attributed to defendant. To hold defendant liable for such an act on the part of any person, it must have been shown that the act was committed under its express or implied direction or authority, or that the defendant had knowledge thereof, actual or constructive. But the negligent act and omission in this case, which solely caused the injury, was not done under the direction or authority of defendant, but in direct violation of its express rule; it was in fact, the negligent act and omission of deceased himself, and in no sense the act or omission of the defendant. It is proven conclusively by the testimony offered in behalf of plaintiff that the deceased had charge and control of, and was responsible for all of the actions of Fireman Albright, in the operation of this rotary, which included the cleaning of ashes from the ash pan and the putting out of fire in such ashes. It was not only the duty of the deceased to see that no ashes were cleaned on a bridge, where all the witnesses admitted it was dangerous to clean them, but it was made his positive duty by the rules of the Company, which he knew or was bound to know, to

see that when ashes were cleaned all fire therein was put out. It is shown affirmatively by plaintiff's testimony, that Albright and the deceased were the only persons who knew anything about this ash pan being cleaned at this place, and under these circumstances, the negligent act of cleaning them on the bridge, and the negligent omission to put out the fire in the ashes so that the bridge could not burn, could not be attributed to the defendant, so as to render it liable under this provision of the Federal Statute, or the common law.

Nor could any liability on the part of defendant for this act and omission be based upon the other provision of the statute. This makes the carrier liable for a defect or insufficiency in the track or roadbed "due to its negligence." If the defect or insufficiency complained of was not due to its negligence, then there could be no liability under this portion of the statute. There is no statute applying to Alaska, which defines the obligation of a carrier with reference to making its track and roadbed safe or secure. Whether or not defendant was negligent in this case, therefore, is governed by the common law. It is a well settled rule of law that before a carrier can be held guilty of negligence in permitting its track or roadbed to become defective or

insecure, it must have actual or constructive knowledge of the conditions for which it is sought to make it responsible.

In this case, there is not a particle of evidence to show that any one in authority connected with the defendant railroad, knew or had the slightest reason to anticipate that the ash pan of the rotary would be cleaned on this bridge, or that Albright or the deceased would disobey the Company's rule, and fail to put out any fire in the ashes when they were cleaned. In fact, the evidence in behalf of plaintiff shows affirmatively and conclusively that the only persons who knew these facts were Albright and deceased themselves. Certainly as between defendant and the deceased and his representatives, the knowledge of deceased was not the knowledge of defendant. Nor could defendant be held to have constructive knowledge that deceased would do, or permit the fireman under his control to do such a hazardous thing as clean the ash pan of his rotary on the bridge and not put out the fire. This was especially hazardous at this time, because, as Albright testified, when he was at the snow bank a half a mile or a mile north of the bridge, a very short time before he cleaned the ashes out of the ash pan, he had cleaned his fire and filled up the ash pan (R.

p. 264), which would necessarily make a lot of live coals among the ashes, and make it even more dangerous to clean the pan on the bridge. Much less could defendant have constructive knowledge that deceased would violate its positive rule requiring all fire in ashes dumped on the roadbed, to be put out. Before a master can be held negligent in such a case, both under the statute and common law, it must have had knowledge of the acts or omissions complained of, so it might avoid the consequences thereof; and such knowledge, either actual or constructive, lies at the very foundation of a charge of negligence against him in a case like this.

“In all cases where the establishment of an employer’s statutory liability depends upon its being proved that he was guilty of negligence in the premises, the general rule of the common law is applicable, that culpability cannot be inferred, unless it is shown that the defendant had actual or constructive knowledge of the conditions for which it is sought to make him responsible.”

Labatt’s Master and Servant (2nd Ed.), Vol. 5, p. 5045 and cases cited.

“The servant cannot succeed in his action where neither the employer himself nor his rep-

representative within the meaning of this subsection, had knowledge, actual or constructive, of the existence of the defect which caused the injury.”

Labatt's Master and Servant (2nd Ed.), Vol. 5, p. 5176 and cases cited.

The court instructed the jury that they might find the defendant negligent on two other grounds:

First, because it permitted the crew of this rotary to work more than sixteen consecutive hours, in violation of the Federal Hours of Service law; and

Second, for a failure to provide a track walker or make inspection of the track, so as to discover this fire before the accident.

We will argue later that the admission of evidence as to a violation of the Hours of Service law, and the instructions on this question, and on the question of a track walker and inspection, were erroneous, but we do not think that in any event, negligence in this case could be predicated upon either of these grounds. Before any recovery could be had in this case on the ground of negligence for a violation of the Hours of Service law, it was necessary for plaintiff to allege and rely upon such

violation as a ground for recovery. There is no allegation in the complaint that defendant was negligent in this particular, nor is there a particle of evidence to show that any one in authority with defendant knew that this law had been or would be violated.

The allegations of the complaint are that defendant was negligent in allowing its ties to be burned and destroyed by ashes dumped thereon. It is not alleged that these ashes were dumped on the bridge by Albright, or that he or Reed neglected to put out the fire in the ashes, because they had worked more than sixteen consecutive hours; nor is there a particle of evidence to show, or from which the jury had any right to infer, that the length of time Albright and Reed had been working on this trip had anything whatever to do with their cleaning the ash pan at this place, or failing to put out the fire in the ashes. Albright expressly testified that one of the reasons why the ashes were dumped at this time and place was to save time (R. p. 274), and the other reason was that it was hard to clean the ashes at any other place, because of the frozen snow and ice close to the track (R. p. 259), and he testified that the reason he did not put any water on the ashes was because he thought the fire and ashes

were all off the ties (R. p. 277). While he said he was tired at this time, he did not say, nor is there any evidence from which it can be inferred, that he cleaned the pan at this time and place and failed to put out the fire in the ashes, because he was tired, or because he had worked over the statutory time. Certainly, in the absence of any allegation of negligence in the violation of the Hours of Service law, or a particle of evidence that the negligent acts were committed, or the rules violated, because of a violation of this law, no negligence could be based thereon.

There was no allegation in the complaint of any negligence on the part of defendant in failing to provide a track walker or to inspect the track at this time and place. Nor was there a particle of evidence that defendant did not provide such a track walker or inspect the track. The only evidence on this question was the testimony of witness Lee, that when the train ran into the snow bank above the bridge, before backing back to take water, they had picked up some section men and brought them back to load the coal on to the rotary; that he had seen these men around the bridge while they were there, but did not see them when they were leaving (R. p. 96), and the following testimony, received over

defendant's objection. Lee was asked on re-direct examination by Mr. Cobb, the following questions:

Q. "Do railroads that you have been accustomed to usually resort to any other method to see that the track is in order before a train is sent out?"

He answered: "Yes, sir."

Q. "What is done to safeguard the track besides the sprinklers?"

A. "Why, they have track walkers."

On defendant's motion, this answer was stricken out (R. p. 143).

If a recovery could be had in this case on the ground that defendant was negligent in not providing track walkers or inspecting the track at this time and place, it was certainly necessary for plaintiff to allege and prove that defendant did not have such track walkers, or did not inspect the track. Plaintiff neither alleged nor proved this fact, and certainly a verdict based on negligence in this particular cannot stand in this case.

Furthermore, neither Reed nor his representative could base a charge of negligence against defendant on a want or having track walkers to inspect this track, to see if he had violated a positive rule

of the Company, by doing such a negligent and hazardous thing as to clean an ash pan full of live coals on a wooden bridge and not see that the fire in them was put out. Neither Reed nor plaintiff could be heard to say that defendant did not act as a reasonable and prudent master would act, if it did not anticipate that this negligent act and omission would be committed by Reed or by Albright, for whose acts he was responsible, and send some one to inspect the bridge. We fail to see how the court, under the pleadings and evidence in this case, can say that the defendant committed any act or omitted to do any act, which, as between it and Reed and those having no greater rights than he had, can be charged as actionable negligence under the Federal statute.

We think this is true for another reason. The Federal statute does not change the rule that a carrier is not liable for the negligence of an employee, or for its own negligence in the particulars mentioned in the section referred to, unless such negligence is the proximate cause of the injury or death. In this case, as we have stated, the evidence shows conclusively that the sole cause of the accident was the negligent act and omission of Reed and Albright. No act or omission on the part of the

defendant contributed in any way to the accident. Their negligence, wholly unknown to defendant, and which it had not the slightest reason to anticipate, was the sole, proximate cause of the accident, which would prevent any recovery against defendant either under the common law or the statute.

The trial court charged the jury that it was the duty of defendant to keep and maintain its track, roadbed and ways in a reasonably good and safe condition for the operation of its engines and trains over the same, and to exercise such care in that respect as not to unnecessarily endanger the lives of its employees operating engines over the road, and that a failure on defendant's part to exercise reasonable and ordinary care in that respect is negligence which would render it liable for injuries resulting from such negligence. That it was the duty of the defendant to have the track and ways watched and inspected at sufficiently reasonable intervals, to discover and repair or guard against defects arising from the operation of the road, that would endanger the lives and persons of its employees operating engines over the same, and that a failure to exercise ordinary care in that respect is negligence; and that if Reed was killed because of the negligence of defendant in failing to keep its

roadbed, track or ways in a reasonably safe condition, then their verdict should be for plaintiff.

Assignment of Errors No. 27:

It also instructed the jury that defendant was liable to plaintiff if the death of Reed resulted, in whole or in part, from negligence of *any* of defendant's officers, agents or employees, or by reason of *any* defect due to its negligence in its roadbed, bridge, ties or track at this point.

Assignment of Errors No. 29:

By these instructions the court told the jury that if they found that defendant had failed to have a track walker or inspect the bridge, between the time the ashes were dumped on the bridge and the accident, that defendant would be liable in this action. These instructions were given, not only without an allegation or a particle of evidence to base them on, but they took away from the jury all consideration of the questions of contributory negligence of the deceased, and of his assumption of the risks involved.

Again, by these instructions, the court told the jury that plaintiff might recover if they found that the death of Reed resulted, *in whole or in part*, from the negligence of *any* of defendant's employees, or

by reason of *any* defect due to defendant's negligence, in its roadbed. The court did not limit the right of recovery to the negligence of Albright or Reed, which was the only negligence on the part of any of the defendant's employees shown by the evidence. Nor did the court limit the right of recovery to defendant's negligence as alleged in the complaint, or to negligence in the matter of the dumping of the ashes on the bridge, and the failure to put out the fire, which was the only possible negligence shown by the evidence; but the court permitted the jury to base a verdict upon the negligence of any other of defendant's officers, agents or employees, or upon any other defect in the bridge which they might have thought appeared from the evidence.

It certainly requires no argument or authorities to show that such instructions, under these circumstances, were erroneous.

The court also instructed the jury that it was unlawful for defendant to require or permit its employees to be or remain on duty for a longer period than sixteen consecutive hours, and that if at the time of the death of Reed, defendant was guilty of violating this statute, and such violation, *in any way contributed to such death*, then, even

though Reed was guilty of contributory negligence, such negligence should not be considered by them in assessing the damages against defendant and in favor of plaintiff and her children. The jury were given to understand by this instruction that it was negligence on the part of defendant to allow or permit Reed and Albright to work more than sixteen consecutive hours upon this trip, and that if they found that this violation contributed to the accident, they must find for plaintiff, and could not reduce the damages by reason of any contributory negligence on the part of deceased.

In the absence of any allegation of negligence in this regard, or of a particle of evidence to show that the length of time Reed and Albright had worked on this trip, had anything whatever to do with the burning of the bridge, this instruction was certainly improper.

Before plaintiff could base a right to recover on a violation of the Hours of Service law, she must have alleged such violation as one of the grounds of negligence relied on, and alleged and proven that such violation was the cause of or contributed to the accident.

Under all the evidence in the case and the pleadings, it seems to us clear that plaintiff failed to

show any negligence upon the part of defendant or its employees, for which a recovery could be had in this case. It is a well settled principle of law that the measure of the duty of the master to the servant, and consequently the rule by which the master's negligence is to be determined, depends not only on the knowledge of the master of the conditions causing the injury, but also on the knowledge of the injured servant. Servants cannot be heard to say that the master is negligent in any particular, where the servant has all the knowledge of the conditions complained of which the master has, and much more so is this true where the servant himself, not only has the only knowledge of these conditions, but he himself is responsible for those conditions. The servant's knowledge of the risk conclusively negatives the inference that the master was under any duty to protect him therefrom; the servant is precluded by his own knowledge, and in this case by his own acts and omissions, from enforcing any right of action on account of any failure on the part of the master to take precautions against injury from these conditions, known to the servant.

Labatt's Master and Servant (2nd Ed.) Sections 952, 953.

II.

ASSUMPTION OF RISK.

It is shown conclusively in this case by the testimony of witnesses for plaintiff, that deceased knew these ashes had been dumped upon the bridge by his fireman, and that although he asked the fireman if he was sure the fire in the ashes was all put out, he did nothing himself to ascertain if this was true. No other employee of defendant was shown to have known anything about the dumping of these ashes. Deceased knew, or must have known, the danger of dumping ashes on a bridge, and that the positive rule of the Company required all fire from ashes removed from ash pans to be extinguished, and that he was held equally responsible with his fireman for seeing that this was done. Deceased not only knew all that defendant knew or possibly could have known about this matter, but he and his fireman were the only persons who knew about it. Under these conditions, we think deceased assumed all the risks of injury in this case.

Section 4 of the Act of 1908 provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation*

by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee." The court will note that Congress has recognized in this and the preceding section of the Act the clear distinction between contributory negligence and assumption of risk. In Section 3, it has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employee, which violation contributed to the injury.

The statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its express terms. The rule of assumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the maxim, "*volenti non fit injuria*," the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resulting therefrom, other courts

base the defense upon the contract of employment between the parties.

Whether this rule is based upon the maxim "*volenti non fit injuria*" or upon the contract of employment between the parties, we do not think makes any difference in this case, although we think this court is committed to the rule that the defense is based upon contract.

Welsh vs. Barber Asphalt Paving Co., 167
Fed. 465.

If based upon contract, then the effect of the contract between the parties in this case was that deceased contracted to run over the bridge in question, after the ashes had been dumped thereon, and the fire not put out, and that it should not be negligence on the part of defendant not to ascertain whether or not the fire in these ashes had been put out, or the bridge burned therefrom. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily ran over this bridge, knowing that the ashes had been dumped thereon, and the possibility of their setting fire to the bridge.

We do not think there can be any question but that the defense of assumption of risk under the

Federal statute remains as it was at common law, except in the one instance named in the statute, namely, where the injury is caused by the violation of a statute for the employee's safety.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relationship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act, is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.*, 125 Pac. 331, 335, speaking through Mr. Justice Sullivan, says:

"1. We will first determine whether said Act of Congress is applicable to the facts of this case.

“That Act of Congress refers only to the inter-state commerce, abrogates the fellow-servant rule, extends the carrier’s liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk.”

The learned judge, at page 336, indicates in what manner the defense of assumption of risk has been restricted, saying:

“Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law.”

The Supreme Court of Texas, in the case of *Freeman, Receiver, vs. Powell*, 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

“It thus appears that under the Federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit.”

We think our contention in this regard is also clearly recognized in the following cases:

Scott vs. C. R. I. & T. R. Co., 141 N. W. (Iowa) 1065;

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec. May 15, 1913, page 518;

Boston & M. R. Co. vs. Benson, 205 Fed. 876;

Second Employers' Liability Acts, 223 U. S. 1.

It follows, therefore, that whether or not deceased assumed the risks involved in this case, depends upon the rule at common law. There, a servant assumes not only the ordinary risks of his employment, but he assumes all extraordinary and abnormal risks, of which he knows, or which are so patent and obvious that he cannot be heard to say that he did not know of them. He cannot shut his

eyes to risks which he knows, or which are so obvious that a man of his age and understanding is bound to know them, and then charge his master with negligence in failing to protect him from these risks. Much more is this rule correct where the testimony shows that the risks were caused by the negligent acts or omissions of the servant himself or of one for whose conduct he is responsible, and which only he and those responsible to him knew of, and which were unknown to the master, and which the master had no reason to anticipate.

Katalla Co. vs. Rones, 186 Fed. 30;

Pacific T. & T. Co. vs. Starr, 206 Fed. 157;

Texas & P. Co. vs. Harvey, U. S. Sup. Ct.
Dec., May 15, 1913;

Little Rock & M. R. Co. vs. Barry, 84 Fed.
944;

Labatt's Master and Servant (2nd Ed.), Sec-
tion 595.

Defendant, by numerous requests, asked the court to instruct the jury that under the evidence in this case, deceased assumed the risk of injury and plaintiff could not recover. These requests were refused, and the jury was instructed that if they found the accident occurred through the negligence of defendant, then Reed did not assume the

risk of dangers due to that negligence; and the court instructed the jury that by the term "assumed risks" was meant that the deceased was presumed "to have assumed all the risks and hazards incident to the employment, and known to him." But by its other instructions, the court clearly told the jury that if the accident occurred through the negligence of defendant in permitting the train crew to work over the statutory time, or by omitting to properly inspect the track, then their verdict should be for plaintiff, and thereby it took away from the jury all consideration of the defense of assumption of risk.

We think this was clearly erroneous, and that the court should have decided, as a matter of law, under the evidence in this case, that deceased did assume all risks involved; or in any event, that defendant's requested instructions should have been given, and that the jury should have been told that even if defendant was negligent in the matters alleged and shown by the evidence, nevertheless, that if they found deceased knew all the conditions constituting such negligence, and made no objection, but ran his engine over the bridge with that knowledge, then plaintiff could not recover.

HOURS OF SERVICE LAW.

1. Unquestionably, under the Act of Congress of March 4, 1907, enacted to promote the safety of employees and travellers upon railroads by limiting the hours of service, if an accident occurred by reason of violation of the terms of this act, the person injured could base his right of action upon such violation.

It is, however, elementary (and therefore no authority will be cited to the point), that where one relies upon a breach of statutory duty, that breach must be alleged and proven. An examination of the complaint (R. p. 2) discloses that a violation of the aforesaid Act was not relied upon nor charged in the complaint. As well stated by the court in the instructions given to the jury, the only allegations of negligence were that the deceased met his death by reason of a defect caused by allowing ashes to be dumped on the roadbed (R. p. 243, middle of page).

In the face of well recognized principle, and in the entire absence of allegation, the plaintiff was permitted to prove that the continuous hours of service of the crew on the derailed train exceeded the statutory limit (R. p. 59, testimony O. L. Larson). This testimony was not in avoidance of any affirmative matter offered by the defendant, but was

given as direct evidence of negligence upon the part of the employer. To the objection urged by defendant that the testimony was irrelevant to the issues, the trial court called attention to the fact that the testimony would be deemed competent and relevant as tending to show a violation of the statute, and therefore liability of the defendant. True, the language of the court in the presence of the jury was not explicitly to that effect, but the evident purpose of his language and the direct effect of the ruling went to that extent (R. p. 59). So explicit was the ruling of the court upon the point, that the defendant objected to any and all evidence offered on that point and that an exception be allowed to the ruling admitting that line of testimony. The court assented to that form of objection and allowed the exception (R. p. 87). Thereafter, all testimony going to this point was admitted under that ruling and exception.

The case was, therefore, submitted to the jury under wholly erroneous and prejudicial ruling and testimony, and under a claim of a ground of negligence not in issue and wholly unwarranted in law, and which were necessarily pressed upon the attention of the jury, not only in the evidence and by the argument, but also by the ruling of the court. Nor, as we shall hereafter notice, did the court

neglect to call this statute to the attention of the jury in the instructions given. The evidence relating to the hours of service was not offered or received for any other purpose except to show a breach of statutory duty by the defendant. The effect of this evidence, and of the ruling in receiving it, was to charge the defendant with an act of negligence and to impress the jury with the view that by reason of such act the defendant had rendered himself liable in this action; and this method, unsupported as it was by any proper rule of evidence, could not be otherwise than extremely prejudicial to the defendant, and constituted such error that a new trial should have been granted. When we look at the circumstances of this case, and then view the size of the verdict returned, we must search for some reason which influenced the jury in assessing such gross damages. Unless it should be admitted that the jurors were actuated by passion or prejudice, arising from their condition of mind, it may well be believed that they were led into a mistaken view of the case by the error here complained of.

2. Now conceding, for the purpose of argument, that the evidence touching the hours of labor was competent and relevant under the issues, yet the action of the court in submitting this matter to

the consideration of the jury was grave error. It not only had a tendency to prejudice the minds of the jurors, but under the instructions of the court it deprived the defendant of its defenses.

The court charged the jury as to the provisions of the act approved April 22, 1908, and the amendments approved April 5, 1910, relating to the liability of common carriers by railroads, particularly calling attention to that portion of the act which provides, that any employee shall not be held liable to have assumed any risks, where the violation by the carrier of any statute enacted for the safety of an employee contributed to his injury or death (R. p. 334). The court then further instructed the jury, touching the Hours of Service law, setting out its provisions and declaring the time when such law became effective and in force (R. pp. 337 and 338). The court further explicitly and directly charged that if there had been a breach of the Hours of Service law which in any way contributed to the injury of deceased, then any contributory negligence on the part of the deceased was not to be considered by the jury.

While there was no allegation of a breach of the Hours of Service law, still the evidence erroneously received relating to continuous hours of ser-

vice did not in any way tend to show a connection between the working beyond the statutory time and the happening of the accident.

In the case of *St. Louis I. M. & S. R. Co. vs. McWhirter*, decided June 10, 1913, reported in No. 17, page 858, advance sheets of Opinions of United States Supreme Court, L. C. P. Co., the Supreme Court had before it the following facts:

The deceased was employed as a flagman by the defendant company, and was run over and killed by the train on which he was serving. It was alleged that his death resulted from wrongful and negligent acts of the conductor and engineer in charge of the train, and of the train dispatcher and other officers of the company, and that there had been a violation of the Hours of Service act, and that the negligent acts of the officers of the defendant and the violation of the act aforesaid were the proximate and sole causes of the injury and death. The deceased dismounted from the engine to throw the switch, running ahead of the engine to perform that service, and in some manner fell under or was struck by the engine from which he dismounted and which was following him. It will be noted that in that case, contrary to the fact in the case at bar, the violation of the statute was charged as a proximate cause of

the accident. The court held that it was impossible to recover, since the purpose of the act was not to subject carriers to the liability of insurers; that no such liability is expressed in the statute, and it cannot be supplied by implication; that where negligence is charged, it must be shown that the alleged negligence was the proximate cause of the damage; that conceding that a case could be presented where the mere proof of permitting work beyond the statutory time, together with facts and circumstances connected with the accident, might justify the conclusion of negligence and the inference of proximate cause, yet the mere act of permitting an employee to work beyond the statutory period, created no liability irrespective of the connection between the alleged negligence and the injury complained of; and, further,

“We are clearly of the opinion that as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so

would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

The court further held that there was no reasonable tendency in the evidence connecting the permitting of the working over time with the accident:

"First, because we think there is nothing in the proof concerning the action of the deceased from which an inference could be drawn, that his jumping from the pilot of the slowly moving engine, was in any way caused by the fact that he had been working over time; second, because we think there was no proof tending to show negligence on the part of the engineer, and therefore obviously no room to conclude that the fact that he had worked over time negligently contributed to the accident."

As alleged in the complaint and proven upon the trial, the cause of the accident was the dumping of ashes and fire upon and along the bridge timbers and structure. The ashes were dumped, as we have heretofore noted (see statement of the case), by the fireman under the direction and with the consent of the deceased engineer. Was there any causal con-

nection between exceeding the limit of hours of service and the dumping of these ashes? Manifestly, there was none; because, first, the fireman believed it was a favorable opportunity to dump the ashes at that point, while the engine was being filled with water, and there was no proof from which an inference could be drawn that this accident was in any way caused by the fact that he had been working over time; and, second, because the engineer fully understood and agreed to what the fireman was doing, and the acts of the fireman in cleaning the pan were done under the engineer's direction, and the proof shows that the engineer was not under any disability at the time, and there was no proof tending to show that, on account of having worked over time, the engineer negligently contributed his direction and consent to the cause of the accident. On the contrary, the proof shows that the engineer and fireman were in the possession of their even faculties, and for several hours after the dumping of the ashes, creating the cause of the accident, well and carefully managed the rotary and the engine where they were engaged. There is not a suggestion in the sworn proof that the working of over hours remotely contributed to their action, and as stated by the Supreme Court "the inquiry whether there was any proof having such tendency is not to be

solved by indulging in mere surmise or conjecture or by resorting to imaginary possibilities.”

3. Section 3 of the Hours of Service act (34 Stat. L. 416) provides that the act shall not apply where the delay is the result of a cause not known to the carrier or its proper officer at the time an employee left a terminal, and which could not have been foreseen. It should be remembered that this railroad was being operated in a far northern country, and that the conditions were such that it was impossible to ascertain at the terminal of Cordova on the water, what weather conditions might by chance be encountered before the end of an ordinary run. Under ordinary weather conditions in the winter time, and if no severe storms or snow slides were encountered, the trip from Cordova to the end of the division was easily made several hours under the time limit. On this particular trip, the delay and extra hours of service were occasioned and necessitated entirely by the extraordinary quantity of snow accidentally encountered, together with delays occasioned by the disabling of a rotary while waiting for a second rotary and delay in taking water.

Witness Larson, who was the conductor on the regular train following the snow train, testified that

this was the stormy season, and that the rotary was fighting snow; that the reason they took this length of time in reaching Tiekel was on account of the snow encountered (R. pp. 67, 69), and that it was not a good plan to stop very long at a time at any point between Cordova and Tiekel, because the train was liable to be snowed in and become stalled there, and that it was necessary to keep the rotary going to prevent the train becoming blocked between these terminals (R. p. 68).

Witness Lee, engineer of one of the pusher engines in the rotary train, testified that they were "bucking snow" on this trip, and that the reason it took so long to make the trip was "heavy snow," "it was heavy snow—we were going right along, though, but making slow time;" that the snow was not so heavy up to Mile 52, but from that point "it was continuous" (R. pp. 106, 107). On cross-examination he testified that the reason they worked over sixteen hours on this trip was because of the accident to the first rotary, and the heavy snows encountered; that it would have been dangerous to the passengers and mail to stop most places along the line; that he had known the rotary to be snowed in for three weeks along this line (R. pp. 147, 148).

Fireman Kitsman of one of the pusher engines, testified that they were "fighting the snow all the way up" from Mile 55 to bridge 75-A (R. p. 182).

Engineer Townsend of the train following the rotary, testified that there was heavy snow where the first rotary broke down, and that on some trips it might take three or four days to go from Cordova to Tiekel, while on the following trip they might make it in eight or ten hours (R. pp. 292, 293).

Witness Wilson, who was conductor on the rotary train and was called as a witness for plaintiff, was afterwards called as a witness for defendant, and on cross-examination, testified that when they left Cordova the Company could not tell how long it would take to make the trip; that he did not think anybody at Cordova "knew what the snow conditions were at that time;" that they had no telegraph or telephone communication along the worst part of the line, and that the only means the Company had of finding out what the snow conditions were along this line was "through the train." He also testified that when they left Cordova, a train left Chitina to meet them at Tiekel, which was only thirty miles from Chitina; that it was not possible for anybody to tell when leaving Cordova at this time of the year how long it would take to go be-

tween any two points on this railway line; that sometimes when they left Cordova during December or January at eight o'clock, they might arrive at Chitina at four or five o'clock that evening, and again, that they might not get as far as Mile 49 in the same length of time; that they could not tell anything about it until they met the snow conditions along the line; that sometimes when they left Cordova, there might not be any snow at all in Abercrombie Canyon, but five minutes before they reached the Canyon, there might be a slide that would fill it so as to take two or three days to get through, which condition was true of other points along the line. He also testified that the reasons for the delay on this trip were the breaking of the rotary and the weather conditions (R. pp. 326-328).

It will thus be seen that even though negligence had been charged in this respect, and even though these delays had contributed to the accident, yet the delays were not the result of a cause known to the defendant or its officers and which they had reason to apprehend.

It should constantly be kept in mind that the conditions existent in Alaska are not conditions which Congress had in mind when enacting the law in question. In thickly settled communities and in

localities where weather conditions are more settled and better understood, and where railroad corporations can be equipped to meet the provisions of the act, a situation is presented different from the case at bar. In operating in a climate where sudden storms and slides in the mountains are apt to obstruct the road, and where the uninhabited character of the country is such that communication must be had by means of the very train which is being delayed, delays occasioned as in the instance at bar come squarely within the excepting provision of the act.

CONTRIBUTORY NEGLIGENCE AND THE INSTRUCTION TAKING AWAY THAT DEFENSE.

The rules of defendant required its employees to extinguish all fires in ashes removed from ash pans, and that no excuse would be taken for failure in that regard, and that engineers would be held equally responsible with firemen in such matter. The fireman on the rotary cleaned out an ash pan on and about the timbers of the bridge, and the deceased engineer in charge of the rotary knew that the pan was to be cleaned, and knew before he left the bridge that the pan actually had been cleaned. (See statement of case above). The action of these

two employees caused the accident. They were jointly liable to the Company under its rules, and under any rule of law, for the happening of the accident. They assumed all risk of the accident, being the parties who put in motion the forces creating the accident. If we should go so far as to concede that the action of the fireman was the act of a fellow servant, for which the Company would have been liable to the deceased engineer, still, under any view, if the fireman was guilty of negligence, the engineer was guilty of contributing negligence. If it were an act of negligence on the part of the fireman to clean the pan and destroy the bridge (and that is the basis of this action), then it was contributory negligence on the part of the engineer to have acquiesced in this act and to have disobeyed the rule of the Company in respect thereto. It occurs to us that no amount of argument can lend cogency to this statement of the case, and that no amount of authority can add weight to it. It is an indisputable proposition.

Viewing the act of the deceased, then, at this time, as one of contributing negligence, the defendant was entitled to have that fact submitted to the jury for the purpose of having the damages reduced in the proportion provided for by the Second Em-

ployers' Liability Act. The Circuit Court of Appeals in holding that a defendant was entitled to sufficient instructions as to the plaintiff's contributory negligence in a case arising under the Employers' Liability Act, uses this language:

"True it is that the plaintiff's contributory negligence was not a bar to the action; but it was the duty of the jury to consider such contributory negligence, if any, in fixing the measure of damages."

Ill. Cent. R. Co. vs. Nelson, 203 Fed. 956.

The trial court very properly instructed the jury that if the engineer neglected to have the fire removed from the rotary pan extinguished, or if the fire removed from the ash pans was not extinguished as required by the rules of the Company, and in consequence the roadbed was rendered unsafe, that the deceased was guilty of contributory negligence (R. pp. 341, 342), but the jury were charged at two points in the instructions that they should not consider the question of contributory negligence, in case there had been a violation of the labor hour laws which in any way contributed to the injury.

These instructions totally deprived the defendant of any matter of defense or reduction of damages by reason of the contributory negligence of the deceased. The instructions were erroneous, first, because the court failed to define to the jury the method by which they should determine that the violation of the labor hour laws contributed to the accident; and second, because the evidence shows conclusively that such violation did not in any manner contribute to the injury of the deceased.

The evidence being what it was and is, and the court having submitted to the jury the act itself without sufficient definition to guide them in its application to the facts at bar, there can be no doubt that the jury understood that the effect of the violation of hours of service was to create an unconditional liability for all accidents happening during the period beyond the statutory time, irrespective of proof showing any connection between the accident and the working over time. Nor can it be doubted that the court in his ruling upon the reception of evidence, and in the instructions to the jury, held and intended to hold that by operation of law a carrier is an insurer of the safety of its employees while they are working beyond the statutory time. While it is true that the instructions given by the

trial court did not explicitly so state, nevertheless, such instructions must have rested upon that interpretation of the statute. We appropriate to our own use here the language of the Supreme Court of the United States directed to a like condition of the record:

“(a) Because beyond the proof of working over time, there was no offer of proof connecting the accident with the working over time; and (b) because it is apparent that the court of Appeals interpreted the charge upon which it was passing as having that significance, and affirmed it for that reason.”

St. L. &c. Co. vs. McWhirter, supra, p. 864.

The decision in the *McWhirter* case, rendered since the trial and verdict in the case at bar, and the reasoning and the decision in that case being leveled at a like record to the record at bar, it would seem that the errors which call for a reversal of that case constitute reversible errors here.

MOTIONS FOR DIRECTED VERDICT AND JUDGMENT.

At the conclusion of the testimony, defendant moved for a directed verdict (R. p. 239). Upon the return of the verdict, defendant moved for judg-

ment notwithstanding the verdict (R. p. 365). Both of these motions were overruled, but should have been sustained. They were based upon the theory that the negligent act charged in the complaint was performed by the consent of the deceased engineer. The allegation of the complaint, supported by the evidence produced, clearly called for the judgment demanded by these motions. The court by instructions sustained the position taken by these motions, but nevertheless, submitted the undisputed facts to the jury, and then confused the issues by giving contradictory and inconsistent instructions.

The court charged, first, as follows:

“It is undisputed that the cause of the rotary leaving the track on the said bridge 75-A was the burnt condition of the ties and superstructure, leaving insufficient support to sustain the weight of the rotary.” (R. p. 332).

It was further charged that the plaintiff alleged that the deceased met his death by reason of the defendant permitting or negligently allowing ashes to be dumped on the roadbed, and that plaintiff can only recover upon said allegations (R. p. 343). Since it appeared from the evidence that the injury to the roadbed had been occasioned by the combined negligence of the fireman and deceased engineer, and

since it further appeared that under the rules of the Company, engineers were held directly responsible for such a negligent act, there was no reason, either at common law or under the Employers' Liability Act for submitting any question to the jury. But with this condition of the record before the court, and not content with charging the jury correctly as shown by the two instructions last above noted, the court proceeded to give totally contradictory and inconsistent charges. It was charged that the defendant was liable if the accident resulted from the negligence, in whole or in part, of *any* of the defendant's officers or employees, or by reason of *any* defect in the roadbed due to the Company's neglect (R. p. 337).

Having thus charged that any negligence, in whole or in part, of any officer or employee would constitute negligence of the Company, the court further charged that defendant would be negligent in not having a track walker to inspect the road, when the complaint did not charge and the evidence does not disclose that there was no track walker.

Thereupon, and in entire contradiction and inconsistency with the instructions last above noted, the court charged that if the deceased met his death through the negligence of the fireman on the rotary

by reason of having dumped the ashes and failing to extinguish them, then the verdict must be for the defendant (R. p. 340); and further instructed that if the defendant was in no way negligent in its duties, and the injury to the deceased occurred by reason of deceased's own negligence and the negligence of his fellow servants, then the verdict must be for the defendant (R. p. 341).

In other words, the court by different instructions, contradictory in their character, wholly inconsistent as matters of statement of law, confusing alike to the professional or the lay mind, submitted this cause to the jury. In one breath the court charges that if the deceased was injured from the negligence, in whole or in part, of any officer or employee, the Company was liable, and then charges in the next instant that if the injury occurred alone by reason of deceased's negligence or the negligence of his fellow servants, then the defendant was not liable. In one instant it is charged that if after the bridge was set on fire by the rotary, the defendant failed to provide a track walker to inspect the road at the point in question, the Company was liable, and in the next breath it is charged that if the deceased met his death alone through the negligence of the fireman by reason of having dumped ashes

from the pan, that their verdict must be for the defendant.

The rule of law is that instructions must be so framed that they will not only state the law correctly, but be in harmony with each other, to the end that the jury may be aided and not misled. And instructions which are inconsistent or contradictory are erroneous and almost invariably held as ground of reversal, since it is not for the jury to select from contradictory instructions those which correctly express the law.

11 *Encyc. of Pleadings and Practice*, p. 145.

It may be stated with entire confidence that the only instructions of the court relating to the liability of defendant under the issues and the evidence, were the two instructions first referred to in this division of the argument, and that if such instructions had alone been given, defendant would have been entitled to receive a verdict of the jury, and its motion for a judgment notwithstanding the verdict would have been sustained had the jury disregarded such instructions.

MEASUREMENT AND APPORTIONMENT OF DAMAGES.

The verdict returned was for the gross sum of \$20,000 in favor of plaintiff and against defendant (R. p. 378). This verdict ought not to be sustained for the reasons, first, that it was returned under instructions touching the measure of damages that opened to the jury the door for speculation and conjecture, and which instructions were against the rule as established by the Supreme Court of the United States; and second, that the damages were not apportioned to those for whose benefit the action was brought as required by law.

1. In a series of cases recently decided by the Supreme Court of the United States, it has been held that the damages recoverable in actions under Employers' Liability Acts are limited strictly to the financial loss sustained by those for whose benefit the representative is suing.

Michigan C. R. Co. vs. Vreeland, 227 U. S. 59; 33 Sup. Ct. Rep. 192;

American R. Co. vs. Didricksen, 227 U. S. 145; 33 Sup. Ct. Rep. 224;

Gulf &c. R. Co. vs. McGinnis, 228 U. S. p. —; 33 Sup. Ct. Rep. p. 426.

In the instant case the court charged that in estimating the loss to the plaintiff and her minor

children, it was proper to take into consideration the age, health, etc. of the deceased, and "the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family, and thus determine the value of the life. From this amount deduct the personal expenses of the deceased, and the balance, reduced to its present value would be the present amount of the verdict, provided that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority."

The evidence showed the age, habits and occupation, and earning capacity of the deceased, and the plaintiff testified as to how long she and deceased had been married, the ages of the children, and that the married relations between herself and the deceased were happy. That was the extent of the testimony (R. p. 293). No evidence was introduced to show what care and attention, instruction or training the deceased might be expected to give to his wife or his children. The court told the jury that they should estimate the matter of the care, attention, and instruction and training which one of his disposition and character "*may be expected to give to his family,*" that is to say, the jury were told

that they should estimate the financial value of these things, according to their various tastes, habits and opinions.

In *Michigan Central R. Co. vs. Vreeland*, *supra*, the representative was suing for the benefit of the widow alone, and the court among other things, instructed the jury that they should consider in estimating the damage the loss of "care and advice." The Supreme Court remarked that by the instructions given in that case, the jury were left to conjecture and speculation. "They were told to estimate the financial value of such care and advice from their own experiences as men. These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

Here the court told the jury to allow for like things that amount which "one of his disposition and character may be expected to give to his family, and thus determine the value of the life." Of course what one of his disposition and character might be "expected" to give to his family, was the amount which was necessarily left to the experience

of the different jurors according to the standard of their various tastes, habits and opinions. There was no evidence in the case showing what such "care and attention" or "instruction and training" might be worth to the widow, or might be worth to one or both of the children, or might be worth to all three conjointly, nor was there any evidence that the wife would be deprived of any care and attention or instruction and training, or that the children had actually been deprived of such advantages. The fitness of the parent and husband in these regards was not put in evidence. Under the record, as shown here, it is impossible to "determine the value of the life," as the jury were told in this instance, without invading the field of conjecture and speculation. The instructions given here come squarely within the interdiction of the decision in the *Free-land* case. The decision in the *Free-land* case goes to the point that the pecuniary loss or damage to the wife or children must be measured by some other standard than the mere loss of society, delightful companionship or mere personal attention and association, but that there must be evidence of an actual loss in care, training and education which must be supplied by the services of another for compensation, and that only upon proof of such matters may the court submit such items of loss to

the jury. In the *Didricksen* case, *supra*, the terms used in the instruction were "deprived of his society" and "care and consideration." The court held that the loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this, and that laying out of consideration the indefiniteness of the term "care and consideration" there was not any evidence relating to the subject or from which its pecuniary value might have been estimated.

2. The court did not charge the jury as to the measure of damages that should be allowed on account of the loss to the widow, or as to the measure of damages on account of loss to the children or either of them. The jury were instructed to estimate the loss according to the method pointed out by the court, deduct the personal expenses of the deceased, and then the balance would be the present amount of the verdict. And then further, charged (upon a totally incomprehensible theory) that the minor children of the deceased would not be entitled to compensation for the death of the deceased for a period beyond their attaining their majority, but did not direct the jury to apportion the damages,

but by plain inference, directed the return of a gross verdict.

Under the act of 1908 (35 Stat. L. 65) no expressed provision was made for apportioning the damage among those for whom the action was brought. Yet in the *Vreeland* and *Didricksen* cases it is plainly intimated that such should have been the course, and in the *McGinnis* case the Supreme Court expressly say:

“The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return.”

In the amendment of 1910, (U. S. Comp. Stat. Supp. 1911, p. 1322) it is provided as follows:

“And in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought.”

In the case of *Fogarty vs. Northern Pacific R. Co.*, Vol. 32, No. 7, Advance Sheets, Wash. Dec., page 292, July 30, 1913, the Supreme Court of the State of Washington passed upon the point contained under this title sub-division, commenting upon and following the decisions of the Supreme Court above referred to. In that case the question of damages was submitted substantially as in this case and the jury returned a single sum. Say the court:

“It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and children, that they had not sustained an equal financial loss, or they might have found that one sustained such a loss which the other did not; yet, under the instructions to assess the damages in a single sum, there was no way to indicate the determination of the jury as to the pecuniary loss suffered by each claimed beneficiary.”

For the reason that the court did not limit the damages strictly to the financial loss sustained by the wife and children, and for the reason that the court did not direct the jury to apportion the damages, the Supreme Court of the State of Washington

reversed the judgment in the *Fogarty* case and remanded the cause for a new trial.

In concluding this argument, we urge, however, that this case should not be remanded for a new trial, for the reason that the undisputed evidence and uncontradicted facts show an entire absence of liability on the part of the defendant, and therefore the judgment in this cause should be reversed with instructions to dismiss the action; but, in any event, a new trial must be awarded because the verdict as rendered under the instructions of the court cannot be sustained.

Respectfully submitted,

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No. 2301.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

COPPER RIVER AND NORTHWESTERN
RAILWAY COMPANY,

Plaintiff in Error,

vs.

Mrs. E. A. REED, as Administratrix of the Estate of
J. E. REED, Deceased,

Defendant in Error.

Upon Writ of Error to the United States District
Court for Alaska, Third Division.

Brief of Defendant in Error.

MOTION TO STRIKE OUT CERTAIN POR-
TIONS OF THE TRANSCRIPT OF THE
RECORD.

Now comes the defendant in error, and moves the Court to strike out the following portions of the printed record in this case, to wit:

1st: Motion to quash and set aside summons, and service of summons, and return of summons.

(R., pp. 6, 7).

2d: Affidavit of R. J. Boryer (R. 7, 8).

3d: Affidavit of S. T. Brightwell (R. 9, 10).

4th: Order denying motion (R. 11).

5th: Motion for change of place of trial and affidavits in support thereof, and *contra* (R. 11, 21).

6th: Motion to make complaint more definite and certain, and order denying said motion (R. 22-24);

for the reason that said papers are not embodied in any bill of exceptions and form no part of the record proper in this case, and are improperly inserted in the transcript.

And for the same reasons and upon the same grounds to strike out the following portions of the printed record, to wit:

- 1st: Order for special term of court (R. 30-33);
- 2d: Order directing issuance of special venire (R. 33);
- 3d: Order directing issuance of special venire (R. 34, 35);
- 4th: Order excusing trial jurors (R. 36);
- 5th: Exception to jurors (R. 38-40);
- 6th: List of jurors summoned (R. 41, 42).

Defendant in error further moves the Court to strike out the following:

- 1st: Paper entitled "Instructions (requested by defendant)" (R. 349-355);
- 2d: Motion for directed verdict (R. 355, 356);
- 3d: Paper entitled "Defendant's exceptions to Court's instructions to jury and formation of jury" (R. 357-364);
- 4th: Motion for judgment notwithstanding verdict (R. 365-368);
- 5th: Order denying motion for judgment notwithstanding verdict (R. 369);
- 6th: Motion for new trial (R. 370-376);
- 7th: Order denying same (R. 377);

for the reason that said papers are not embodied in any bill of exceptions, or authenticated in any way to make them a part of the record on writ of error, and

such papers have no proper place in the transcript of the record.

And the defendant in error further moves the Court to strike out the paper entitled "Transcript of Testimony, found in the printed record, beginning on page 48, and ending on page 346, on the following grounds, to wit:

That the same is not authenticated as a bill of exceptions as required by law, in that it is not signed and certified to by the Judge of the court below, but is approved, allowed, and settled by order of the Court (R. 347).

ARGUMENT ON MOTION.

The documents appearing in the transcript, pages 6 to 24, pages 30 to 42, and pages 349 to 377, do not purport to be a bill of exceptions, are not in any way authenticated by the Judge, and form no part of the record on appeal. It is difficult to see for what purpose plaintiff in error had them incorporated into the transcript, unless it was to increase the costs it hoped to recover.

"The fact that papers not in the judgment-roll are in the transcript, and certified to by the clerk, does not make them any part of the record on appeal, when they are not brought into the record by any bill of exceptions or agreed statement of facts, or in some other way recognized by the rules of practice of the federal court."

Duncan vs. Atchison T. & S. F. R. Co., 72 Fed.
808.

The "Transcript of Testimony" which purports to contain also instructions to the jury (R. 48 to 346), is

followed by an "Order allowing, certifying, and settling bill of exceptions" (R. 346, 347). This is followed by another paper, separately entitled in the cause, and entitled "Court's Certificate to Bill of Exceptions."

The "Transcript of Testimony," and the order and certificate, were separately indorsed and separately filed (R. 48 and 348). The first document is not signed by the Judge. The second and third documents appear in the transcript twice, once at pages 346, 347, and again at pages 473-475. It was apparently intended, by having them inserted in the transcript the second time, to authenticate everything not authenticated by the first insertion. In other words, that by having this order and certificate inserted in the transcript, whatever preceded them became thereby a bill of exceptions.

"The signature of the Judge to the order (approving bill of exceptions) did not constitute a signature to the bill of exception," is the decision of this Court in *Dalton vs. Hazelett*, 182 Fed., at p. 568.

This record is in substantially the same as, but if anything more objectionable condition, than the record in cause No. 2299, *Copper River & N. W. Ry. Co. et al. vs. Reeder*.

THE CASE MADE BY THE RECORD.

There are fifty-one assignments of error in the transcript, covering forty-one printed pages. Of these the first seven, Nos. 9, 10, 11, 15, 16, 17, 18, 20, 21, 22 and 23, are waived in the brief. The remaining thirty-three assignments are grouped under eight heads and it is contended that eight different ques-

tions of law are raised by the assignments on the record. As a matter of fact, there is not a single one of the questions discussed in the brief of plaintiffs in error that is raised on the record so as to be entitled to review in this court. Most of the questions sought to be raised were never presented to the Court below, and are suggested for the first time in this court.

Before taking up the several contentions of the plaintiff in error, made in the brief, it will be useful, we believe, to examine, in some detail, the assignments of error, in relation to the record upon which they purport to be based.

Assignments of error Nos. 8 to 19, inclusive (Brief of Plaintiff in Error, pp. 19-25), relate to the admission and exclusion of certain evidence. We object to the consideration of these assignments, for the reason that the evidence is not brought into the record by bill of exceptions.

If, however, the Court should overrule the decision in *Dalton vs. Hazelett*, *supra*, and consider the assignments, then we maintain there was no error in the ruling of the Court. The evidence admitted over the general objections of the defendant tended to show that the train crew, at the time of the wreck, had been worked in violation of the sixteen-hour law, which contributed to the fatality, and was raised by the answer setting up assumed risk, and denied by the reply. Defendant did not object that this violation of the law was not specifically set up in the reply. The opening statement of plaintiff's counsel *did* refer specifically to this matter (R. 59), and the Court called Mr. Boryer's attention to it. Mr. Boryer did

not object that the issue was improperly raised, or that he was surprised and not prepared to meet it. On the contrary, he stated: "I understand the statute, but I desire to make the objection," and the Court replied: "If that is all you have to say about the objection, it will be overruled and exception allowed."

Defendant met this issue by admitting the fact, and offering to show that the men willingly worked overtime—which evidence the Court, of course, excluded. This evidence so offered is referred to in assignments 13, 14 and 19.

Assignments Nos. 25 to 34, inclusive, complain of certain instructions.

If the paper entitled, "Transcript of Testimony, etc." (R. 48-346), is not a bill of exceptions, then there are no instructions in the record. If that paper is to be considered a bill of exceptions, then there are no exceptions to the instructions. In any event these assignments cannot be considered.

2 Enc. U. S. Sup. Ct. Rep. 83.

Assignments Nos. 35 to 49, inclusive, complain of the alleged refusal of the Court to give certain instructions. But these instructions are not even in the paper called "Transcript of Testimony, etc." There is in the transcript a paper entitled "Instructions (Requested by Defendant)" (R. 349-355), containing fifteen paragraphs, each followed by the word "(refused)." But there is nothing to show that these instructions were ever presented to the Court before the jury retired, or at all, or that the Court was ever asked to give them.

"Instructions printed in a transcript on appeal as

having been given, or asked and refused on the trial, but which are not contained in any bill of exceptions, or in any manner authenticated by the trial judge, do not constitute a part of the record in the case.”

Sternenberg vs. Mailhos, 99 Fed. 43.

The fiftieth assignment complains of the refusal of the Court to enter judgment for defendant *non obstante veredicto*. It is manifestly frivolous; especially in view of the recent ruling of the Supreme Court in *Slocum vs. Insurance Co.*, 228 U. S. 364.

The fifty-first and last assignment complains of the denial of defendant's motion for a new trial. By repeated decisions of the Federal Courts, this question cannot be considered on a writ of error.

We have thus gone through all the assignments of error, except the twenty-fourth, which we will notice later, and find there is not a single question raised by them *on the record*; and certainly none of the questions so ably and ingeniously argued by counsel in their brief.

The twenty-fourth assignment complains of the action of the Court in denying the motion of the defendant for a directed verdict. If the paper entitled “Transcript of Testimony, etc.,” cannot be considered a bill of exceptions, then the motion and evidence is not in the record. If it is to be considered a bill of exceptions, then it perhaps raises the question as to whether there was any evidence from which the jury could legally find for the plaintiff.

Both in the motion (R. 329, 330) and in the argument in their brief, the learned counsel for plaintiff in error overlook or ignore much important evidence.

Their argument is largely based upon the assumptions—

1st. That the proximate cause of the injury was the cleaning of the ashes on the bridge by Albright, the fireman of the rotary.

2d. That the act of Albright was the act of Reed, the engineer, who, it is claimed, had absolute control over his fireman.

In the first place, there was evidence tending to show that Albright extinguished the fire in his ashes, and that the bridge was burned by cinders negligently dropped from some one of the other three engines, or that the proximate cause of the accident was the negligence of the brakeman on the last car in not seeing the fire, or of the section gang who were on the ground presumably to look after the bridge. In the second place, a fireman and engineer are fellow-servants. And the evidence tended to show that the engineer of a rotary has no control or supervision whatever over his fireman—they are in different compartments, and work independently. (Testimony of Townsend, R. 286, 287, 290, 291; Testimony of Wilson, R. 324, 325.)

The jury might also well have concluded that the proximate cause of the fatal accident was the negligence of Holden, the rotary pilot, in not seeing the burning bridge before running into it, caused by his overworked and exhausted condition. Without going into the evidence in greater detail, we think it beyond question that the case was one for the jury.

This, it seems to us, disposes of all the contentions of the plaintiff in error.

There are two questions, however, argued so strenuously by the learned counsel for plaintiff in error, that we deem it proper to notice them a little further. We refer to Points VI and VII (Brief of Plaintiff in Error, page 18).

The sixth point deals with the measure of damages, and is based upon the twenty-eighth assignment of error, where the entire charge on the measure of damages is set out. The particular portion of the charge criticised is that the Court told the jury that they might take into consideration, among other things, "the care and attention, the instruction and training, one of his disposition may be expected to give to his family." These things can be purchased with money, and it would seem that there is a pecuniary loss, and we think the instruction correct.

Conceding that there was error; conceding that there is a bill of exceptions in the record; conceding that the "exceptions" filed May 5th, and not in any pretended bill of exceptions, can be considered,—conceding all this, we say, that this contention should not here prevail, and lead to a reversal of the judgment. For not only did the counsel for defendant fail to except at the time, and thus give the Court an opportunity to omit the phrase from the instruction, but after verdict, and an opportunity to carefully scrutinize the instruction, counsel did not raise the question upon which they now ask for a *reversal* of the judgment. The purported exception to the charge is found on pages 360, 361 of the transcript, and reads as follows: "Defendant excepts to instruction given on page 7 regarding damages, for the

reason that the same is contrary to law and not the proper basis for proving damages in this case." That is all. The point is not even mentioned in the motion for a new trial. Under these circumstances and on this record to reverse the case would be for this Court to set a precedent for astute counsel to waive error, if error there be, by silence on the trial, and on the motion of a new trial, and secure a new trial at a ruinous expense to his adversary, and after lapse of time and dispersion of witnesses, may have rendered a just case hopeless.

The seventh point argued in the brief complains because the verdict did not find separately the amount of damages suffered by the widow and each of the two children. It is asserted that the question is raised by the fifty-first assignment. A careful reading of the assignment, and of that part of the purported record upon which it is based, fail to disclose the slightest reference to the subject. No objection was made to the form of the verdict when it was received. No request was made for such separate findings. It is too late to raise the question here. Counsel cannot try the case on one theory in the court below and on another here. But it is argued the verdict is excessive. If that point were open, it is not well taken. Surely a man earning \$3,000 per annum, with a life expectancy of thirty-four years, sober, industrious, and in good health, is worth \$20,000.

In conclusion, we respectfully ask that the judgment be affirmed.

J. H. COBB,
Attorney for Defendant in Error.

5

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
PANY, a corporation,

Plaintiff in Error,

vs.

MRS. E. A. REED, as Administratrix
of the Estate of J. E. REED,
Deceased,

Defendant in Error.

No. 2301.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Reply Brief of Plaintiff in Error.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

610 Central Building,
Seattle, Washington.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
PANY, a corporation,
Plaintiff in Error,

vs.

MRS. E. A. REED, as Administratrix
of the Estate of J. E. REED,
Deceased,
Defendant in Error.

No. 2301.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Reply Brief of Plaintiff in Error.

This brief will be directed solely to the motion of defendant in error to strike certain portions of the record and the argument in support of said motion.

I.

All that portion of the motion contained on page 1 and to the middle of page 2 of the brief of defend-

ant in error will be wholly disregarded, because plaintiff in error does not, in its brief, found any exceptions or claim of error based upon such portions of the record, and it is immaterial in the decision of this cause whether the motion in that regard is granted or not.

II.

On page 3 of the brief of defendant in error, it is moved that the bill of exceptions, styled by defendant in error "Transcript of Testimony," be stricken because the same is not properly authenticated as a bill of exceptions. An inspection of the certified transcript shows that the certificate of the Judge is attached to, and is a part of the bill of exceptions, and refers to the foregoing bill of exceptions to which it is attached, and contains the signature of the judge, and is therefore properly authenticated. This certificate appears on page 348 of the printed record. The motion of the defendant in error in this regard is wholly without basis of fact.

III.

On page 2, defendant in error moves to strike the motion for a directed verdict, defendant's exceptions to instructions, motion for judgment notwith-

standing the verdict, order denying motion for judgment notwithstanding verdict, motion for new trial, and order denying the same.

1. The motion for a directed verdict is set forth in full in the bill of exceptions, and the bill of exceptions shows that the same was overruled and exception allowed (Printed Record pp. 329, 331).

2. The motions for judgment notwithstanding the verdict, for a new trial, and orders denying same, are all matters of record within the statute of Alaska, and therefore it was not necessary to carry them into the bill of exceptions.

3. The exceptions to instructions given by the court were in writing and were presented to the court and allowed by the judge thereof (Printed Record p. 364).

Sections 1053 and 1055, Chapter XXI, Compiled Laws of the Territory of Alaska, 1913, provide that matters in writing and exceptions thereto which have been presented and signed by the judge become a matter of record, and therefore need not be carried into the bill of exceptions, but are matters of record which are properly certified into the transcript by the clerk. The sections referred to are as follows:

“Sec. 1053. The point of the exception shall be particularly stated and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth.”

“Sec. 1055. The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk and thereafter it shall be deemed and taken to be a part of the record of the cause; no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court.”

IV.

It is earnestly insisted that it will not be necessary for this court to consider errors of the lower court which would merely go to the question of granting a new trial. The total failure to show any negligence on the part of the defendant, and the affirmative showing that the accident was caused by the negligent acts of the deceased engineer and his fireman, and that they assumed the risk of any condition which they had thus created, would seem to render it imperative that the judgment below be

reversed with instructions to dismiss the action. All the matters affecting these questions were raised on the trial below and exceptions duly taken and preserved in the bill of exceptions.

It is, however, urged that in any event the verdict returned cannot stand and a new trial must be granted regardless of the consideration of the other questions. As was noted in the opening brief of plaintiff in error, the measure of damages, and the basis for arriving at such damages, were incorrectly given by the court and were in direct violation of the rule established by the Supreme Court of the United States. This instruction regarding the measure of damages was duly excepted to. (Printed Record p. 360.) The court in direct conflict with the statute, and with the construction given the statute by the Supreme Court of the United States, charged the jury to return a gross sum, and received a verdict which did not apportion the damages between the widow and the two children of deceased. Whether excepted to or not, a judgment cannot be rendered upon such a verdict, since there is no finding by the jury upon which a verdict may stand. The personal representative in suing is not asking a judgment for the estate or for himself, but is ask-

ing a judgment for each of the beneficiaries named in the statute, and the statute makes it imperative that the verdict apportion the damages according as the parties are entitled to recover. The court trying the cause, nor any other court having jurisdiction, cannot apportion the damages returned. The administratrix takes a judgment without authority as to its distribution. The statutory action is not for the equal benefit of the surviving relatives, but the interest of each beneficiary must be measured by his or her individual, pecuniary loss. What that loss is—what the apportionment must be—is for the jury to return, and until such apportionment is made by the jury, a judgment cannot be sustained upon a verdict which is for a gross sum without any apportionment of that sum among the several surviving relatives. The administratrix is not entitled to a judgment until a verdict has been returned fixing the amount to which each of the surviving relatives is entitled so that distribution may be made by the representative according to the apportionment of the jury. The representative suing solely for the benefit of the surviving relatives, is without authority to make the distribution or recover a judgment until the verdict of the jury designates the part of the gross sum that each of the bene-

ficiaries should receive. Until there is a verdict apportioning the damages, there is no way to arrive at the determination of the jury as to the loss suffered by each beneficiary, and therefore, there is no ground upon which to base a judgment in favor of the several beneficiaries. As stated in the case of *Railway Co. vs. McGinnis*, 33 Sup. Ct. Rep. 426, "The apportionment is for the jury to return." There is no power resting elsewhere by which an apportionment can be made, and the representative is not entitled to hold a judgment until he has received a verdict apportioning the damages and thereby determining the loss sustained by each beneficiary, and the amount which such beneficiary is entitled to recover.

Respectfully submitted,

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT and

LAWRENCE BOGLE,

Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
PANY, a corporation,

Plaintiff in Error,

vs.

MRS. A. E. REED, as Administratrix
of the Estate of J. E. Reed,
deceased,

Defendant in Error.

No. 2301.

Upon Writ of Error to the United States District
Court of the Territory of Alaska
Third Division.

PETITION FOR REHEARING

W. H. BOGLE,
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F. T. MERRITT, and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

609-616 Central Building,
Seattle, Washington.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
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deceased,

Defendant in Error.

No. 2301.

Upon Writ of Error to the United States District
Court of the Territory of Alaska
Third Division.

PETITION FOR REHEARING

Now comes the plaintiff in error and respectfully presents and urges to this court its petition for a rehearing of the above entitled cause. The opinion herein was filed on the 9th day of February, 1914, and judgment affirming the judgment of the United States District Court for the Territory of Alaska, Third Division, was entered in accordance with said opinion.

This petition for rehearing is presented and

based solely upon the following ground:

The trial court permitted the plaintiff to offer evidence to show that the continuous hours of service of the crew on the derailed train exceeded the statutory limit of service, and this ruling of the trial court was duly excepted to at the time, and such ruling of the court properly assigned as error, and in the brief of plaintiff in error such ruling was specified as one of the errors relied upon, and the opinion of this court did not pass upon the error so excepted to and assigned.

I.

The witness Larson was permitted to testify that the crew on the train had been continuously in service for more than the statutory period and the admission of this testimony was excepted to and exception allowed. See Bill of Exceptions at pages 59 and 60 of the printed record. Evidence of this character was again admitted, over objection, and a specific objection was made to all testimony of that character, and the exception allowed. See Bill of Exceptions at pages 86 and 87 of the printed record. The witness Lee was permitted, over objection, to give like testimony, and an exception al-

lowed. See Bill of Exceptions, pages 93 and 94, and 145, of the printed record.

II.

The rulings of the court, above referred to, were properly assigned as error under the petition for a writ of error. See assignments 5, 6 and 8 contained in the Assignment of Errors at pages 399 to 403, inclusive, of the printed record.

III.

The brief of plaintiff in error specified the above rulings as errors relied upon in this court, and these errors were urged by way of argument. See pages 19 to 22, inclusive, and pages 83 to 90, inclusive, Brief of plaintiff in error.

I.

The opinion of this court, in affirming the judgment of the court below, places the points and errors presented in two groups, namely, first that there was not sufficient evidence of any negligence for which the Company was chargeable at law, and secondly, the erroneous instructions given to the jury. As to these two groups, the court finds, first, that the

evidence sufficiently showed negligence on the part of the Company, and secondly, that no sufficient exceptions had been taken to the instructions, but the court did not pass upon the point presented in this petition, although it was pressed upon the attention of the court. It is respectfully insisted that the rulings complained of were highly prejudicial, were properly excepted to, and were regularly assigned as error, and were of such controlling weight as to make a reversal imperative.

There was no complaint that a violation of the hours of service law in any manner contributed to the accident, and such violation was not alleged as a ground of action. On page 3 of the opinion of this court, the allegation of negligence contained in the complaint is copied in full and shows that the two grounds of negligence urged were the injury to the roadbed by the dumping of ashes, and the failure of the Company to maintain its roadbed in a safe condition. The violation of the hours of service act is not even remotely referred to.

II.

The record discloses that the violation of the hours of service law, if any, had not the slightest connection with or the remotest effect upon the

accident, and, even if such violation had been alleged in the complaint, it would not have constituted a ground of negligence. The argument presented in the brief of plaintiff in error is here referred to but will not be repeated.

The witness Larson testified that in going from Cordova to the bridge where the ashes were dumped, more than twenty-four hours had been consumed. Also—

“Q. State whether or not the crews of these trains had been continuously in service, on duty, from the time they left here, up to that hour?

(Objection—exception.)

A. I think they had.”

(Printed record p. 59.)

The witness Lee after testifying as to the length of time consumed in the trip, which was more than 16 hours, was questioned as follows:

“Q. Now tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova?

(Objection—exception.)

A. Yes, sir.”

(Printed record p. 93.)

Again:

“Q. When you reached Teikell how many

hours had you been continuously on duty up to the time you went off duty—how many continuous hours on that trip going up?

(Objection—exception.)

A. Forty-five hours and fifteen minutes my time shows.”

(Printed record p. 145.)

We are presenting this ground for rehearing with all possible insistency because the ruling complained of and the evidence admitted, were, in the light of the record, of an extremely prejudicial nature and necessarily constitute reversible error. Counsel for plaintiff in his opening statement to the jury called attention to the violation of this hours of service law. Says the trial court, when ruling that the testimony was admissible: “You probably understand, without going into details, the statute referred to by Mr. Cobb in his statement.” (Printed record p. 59.) At great length, counsel for the plaintiff below, examined the witnesses as to the length of the trip, and as to the time consumed, and instituted a comparison between the time taken up on this trip and by trains on other trips over the same route. All this was done over the objection and exception of the defendant; and finally, in defense of his position before the jury, counsel for the defendant requested that he be allowed a general exception to all that line of tes-

timony, and such exception was allowed by the court. (Printed record p. 87.)

To add to the prejudice of the trial court's error, the court specially submitted to the jury the question whether the hours of service law had been violated. If it be urged that this instruction was not excepted to, it is sufficient to say that if it did not add to the error already committed, it wholly failed to cure the prejudice.

We respectfully press upon the attention of this court the case of

St. Louis I. M. & S. R. Co. vs. McWhirter,
229 U. S. 263.

The Supreme Court, after stating that no warrant is found in the statute for holding carriers to the extreme liability of insurers, under the hours of service act, continue:

“We say this because, although the act carefully provides punishment for violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime.”

Again:

“We are clearly of the opinion that, as there was no proof tending to show a connection

between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed.”

In the *McWhirter* case, not only was negligence charged, but also a violation of the act was alleged as inducing the accident. The reversible error in that case consisted in penalizing the Company for permitting its employes to work overtime, without reference to whether the accident was attributable to the act of working overtime. The reversible error here consists in permitting evidence to be received and retained in the record, necessarily prejudicing the rights of the Company, where there was no allegation in the complaint charging a violation of the act, and where in the very nature of the negligence actually charged in the complaint, the act of working overtime could not in any way contribute to or cause the accident.

The charge of the complaint is that the deceased was running as an engineer on the snow plow over the line of the railroad, and was injured because of the roadbed being allowed to become out of repair, and because the Company had not kept and maintained the roadbed in a safe condition. Therefore, if there had been an allegation in the complaint of working overtime, a fair construction of the complaint would show that there was no causal connec-

tion between the accident and the working overtime; but here we have the preposterous situation, first, of a complaint showing upon its face that the accident was of such a character that working overtime could not contribute to or cause the accident; and secondly, the complaint itself wholly fails to charge an act of working over time; and thirdly, the evidence adduced before the ruling was made showed that the act of working overtime could not affect the accident or contribute to the negligence charged; and lastly, with this situation fairly before the court, the impossible ruling was made that proof of working overtime was properly admissible. Counsel for the plaintiff below stated the statute to the jury, and the court in the presence of the jury ruled that the evidence was admissible because of and under the statute, and the questions proposed to the witnesses were propounded so as to fall within the reading of the statute, and finally the court wholly failed at any stage in the trial to correct the error which had been committed over the objection of the defendant, but rather emphasized and insisted to the jury that the evidence had been admitted so that the jury could determine the negligence or want of negligence on the part of the Company by reference to whether the statute had been violated or not.

This highly objectionable evidence was offered for the very purpose of fastening liability under the statute and was received by the court under the openly expressed view that it was admissible for that purpose. And this, too, in the teeth of the uncontrovertible fact that there was no allegation of any violation of the statute, and against pleaded facts in the complaint which showed that the accident could not be attributed to the fact of working overtime, and in the face of a record "demonstrating with mathematical certainty" that the defendant was not liable within the terms of the statute regardless of the state of the pleadings.

As in the *McWhirter* case, the ruling in the case at bar was made by the lower court under the mistaken theory that the mere act of permitting an employe to work beyond the statutory period created liability irrespective of the connection between that fact and the injury complained of.

If it be prejudicial error to receive proof of claimed negligence which is not alleged, or if it be prejudicial error to receive proof of a fact under an erroneous ruling that such a fact creates an absolute, statutory liability, or if it be prejudicial error to hold up to a jury throughout a trial a wholly false theory of liability and invite a verdict

upon that theory, then the ruling complained of is reversible error.

Respectfully submitted,

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT, and
LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,	} ss.
WESTERN DISTRICT OF WASHINGTON,	
COUNTY OF KING.	

I, CARROLL B. GRAVES, one of counsel for plaintiff in error in the above entitled case, and the counsel who prepared the above and foregoing petition for rehearing, do hereby certify that in my judgment the said petition for rehearing is well founded, and that it is not interposed for delay.

Dated this 3rd day of March, A. D., 1914.

CARROLL B. GRAVES,
Of Counsel for Plaintiff in Error.

No. 2310

United States
Circuit Court of Appeals

For the Ninth Circuit.

**GREAT NORTHERN RAILWAY COMPANY, a
Corporation,**

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court
of the District of Idaho,
Northern Division.**

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No. 2310

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
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vs.

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Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho,
Northern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

CHARLES S. ALBERT, Esq., THOMAS BALMER, Esq., Residence, Spokane, Washington,
HERMAN H. TAYLOR, Esq., Residence, Sandpoint, Idaho,

Attorneys for Plaintiff in Error.

C. H. LINGENFELTER, Esq., Residence, Boise, Idaho,

Attorney for Defendant in Error.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Complaint.

Now comes the United States of America, by Curg H. Lingenfelter, United States Attorney for the District of Idaho, and brings this action on behalf of the United States against the Great Northern Railway Company, a corporation, organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Laclede, in the State of Idaho; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A CAUSE OF ACTION,

Plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, [1*] beginning at the hour of 6:00 o'clock A. M., on July 10, 1912, upon its line of railroad at and between the stations of Hillyard, in the State of Washington, and Laclede, in the State of Idaho, within the jurisdiction of this court, required and permitted its certain Fireman and employee, to wit, Ed. Burgen, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 6:00 o'clock A. M. on said date, to the hour of 6:00 o'clock A. M., on July 11, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1151, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

*Page-number appearing at foot of page of original certified Record.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Five Hundred Dollars and its costs herein expended.

C. H. LINGENFELTER,
United States Attorney.

[Endorsed]: Filed October 29, 1912. A. L. Richardson, Clerk. [2]

[Title of Court and Cause.]

Summons.

The President of the United States to Great Northern Railway Company, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Coeur d'Alene, in said District, and answer the complaint filed against you in the above-entitled action, within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said District, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the Court for the relief demanded in the complaint, to wit: For judgment in the sum of Five Hundred (\$500.00) Dollars and for its costs herein expended. The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith, hereby referred to and made a part hereof. [3]

And this is to COMMAND you the MARSHAL of

said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Boise, in said District, this 29th day of October, 1912.

[Seal]

A. L. RICHARDSON,

Clerk.

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern Division. The United States vs. Great Northern Railway Company. Summons. Returned and filed December 12, 1912. A. L. Richardson, Clerk.

U. S. Attorney,

Boise, Idaho,

Attorney for Plaintiff.

Marshal's Return.

This is to certify that I received the within Summons together with a certified copy of the complaint at Lewiston, Idaho, on the 1st day of November, 1912, and served the same upon the Great Northern Railway Company at Sandpoint, in Kootenai County, Idaho, on the 14th day of November, 1912, by handing to and leaving with Herbert Mustell, Agent of the Great Northern Railway Company, at Sandpoint, Idaho, a duplicate of the within summons, together with the certified copy of the complaint.

Dated Nov. 22d, '12.

S. L. HODGIN,

U. S. Marshal.

By Wm. Schuldt,

Deputy. [4]

[Title of Court and Cause.]

Answer.

Now comes the above-named defendant, Great Northern Railway Company, and for its answer to the complaint of the plaintiff herein:

I.

Denies each and every allegation, matter and thing in said complaint contained, except as is hereinafter specifically admitted.

II.

Admits that it is now, and during all the times mentioned in said complaint has been, a corporation, but specifically denies that it was either organized or doing business under the laws of the State of Wisconsin, and alleges, on the contrary, that it was organized, exists and does business under and by virtue of the laws of the State of Minnesota.

III.

Said defendant admits that it has an office and place of business at Laclede, in the State of Idaho, but denies any information or knowledge, sufficient upon which to form a belief, as to whether the above-entitled action was brought either upon the suggestion of the Attorney General of the United States, or at the request of the Interstate Commerce Commission, or upon information furnished by said Commission, and therefore denies [5] the same.

IV.

Said defendant further admits that it is now, and during the times mentioned in said complaint has been, a common carrier by rail for hire, and has been

engaged in interstate commerce by railroad in the State of Idaho, but denies that it was at all times engaged in said interstate commerce in the State of Idaho, and alleges that it was sometimes during the times mentioned in said complaint, engaged in interstate commerce and sometimes engaged in interstate commerce by railroad in the State of Idaho.

V.

Said defendant specifically denies that either in violation of the act referred to in said complaint, as contained in 34 Statutes at Large, at page 1415, or otherwise, said defendant either beginning at the hour of six o'clock A. M. on July 10th, 1912, upon its line of railway at or between the stations of Hillyard in the State of Washington, and Laclede in the State of Idaho, or otherwise, or within the jurisdiction of the above-entitled court, either required or permitted its certain fireman and employee, to wit, Ed Burgen, to be or remain on duty as such fireman for a longer period than sixteen consecutive hours, either from said hour of six o'clock A. M. on said July 10, 1912, to the hour of six o'clock A. M., July 11, 1912, or otherwise.

VI.

Said defendant specifically denies that said employee, Ed Burgen, was required or permitted to be or remain on duty for a longer period than sixteen consecutive hours, or at any time in excess of said sixteen hours, or was engaged in or connected with the movement of defendant's train No. Extra, drawn by its own locomotive engine No. 1151, or otherwise, or that said Ed Burgen was engaged in or connected

with the movement of any train engaged [6] in the movement of interstate traffic, after the expiration of said sixteen hours.

VII.

Said defendant specifically denies that either by reason of the facts alleged in said complaint, or otherwise, said defendant is liable to plaintiff in the sum of Five Hundred Dollars (\$500), or that said defendant violated any act of Congress.

WHEREFORE, defendant prays that plaintiff take nothing herein, and that it be dismissed with its costs and disbursements.

CHARLES S. ALBERT,
THOMAS BALMER,

P. O. Address: Spokane, Spokane County, Washington,

HERMAN H. TAYLOR,
Sandpoint, Idaho,
Attorneys for Defendant.

State of Idaho,
County of Bonner,—ss.

Herman H. Taylor, being first duly sworn, deposes and says, that he is one of the attorneys for the defendant named in the foregoing answer; that the defendant is a nonresident corporation, and that affiant is the duly designated agent of the defendant for the service of process in the State of Idaho, under the laws thereof, and that he makes this affidavit as such, for and on behalf of the defendant. That he has read the foregoing Answer, knows the contents thereof, and believes the facts therein stated to be true.

HERMAN H. TAYLOR.

Subscribed and sworn to before me this 5th day of December, 1912.

[Notarial Seal] E. W. WHEELAN,
Notary Public in and for Bonner County, State of
Idaho.

Due service by copy of the within and foregoing Answer hereby admitted this 12th day of December, 1912.

C. H. LINGENFELTER,
U. S. Attorney.

[Endorsed]: Filed Dec. 16, 1912. A. L. Richardson, Clerk. [7]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that on the 10th day of June, 1913, the above-entitled cause came on for trial before the above court, upon an agreed statement of facts, a jury having been expressly waived, and the cause having been submitted to the above-entitled court for final decision and judgment upon the pleadings and facts agreed upon.

Hon. FRANK S. DIETRICH presided over said court. The plaintiff appeared by C. H. Lingenfelter, its counsel, and defendant appeared by Charles S. Albert, Herman H. Taylor and Thomas Balmer, its counsel, and the following proceedings were had: Plaintiff offered in evidence the agreed statement of facts, a copy of which agreed statement of facts is hereto attached:

[Title of Court and Cause.] [34]

Agreed Statement of Facts.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, plaintiff and defendant, in the above-entitled cause, each acting herein through its respective counsel of record, that each of the parties to this action hereby waives the right to have tried by jury the issues of fact created by the pleadings in this case, and each of the parties hereto submits this cause to the above-entitled court for final decision and judgment upon the pleadings in this cause and the facts agreed upon by the parties as set forth in the following statement of facts:

IT BEING ESPECIALLY AGREED by and between the parties to said cause, that all of the facts herein stated are hereby admitted to be and shall be taken as true, and shall, for all the purposes of this action and its final determination be treated in all respects as if duly and fully established, subject to the objection which either party may make as to the competency, materiality or relevancy of such facts.

The facts agreed upon as aforesaid are as follows, to wit:

I.

The facts agreed upon as aforesaid as to plaintiff's alleged cause of action set forth in the complaint herein are as follows, to wit:

1. That the defendant, Great Northern Railway Company, is and during all the times herein mentioned was, a common carrier, engaged in interstate commerce by railroad in the State of Idaho.

2. That at Hillyard, in the State of Washington, on the 10th day of July, 1912, at the hour of 6 o'clock A. M. on said day, said defendant called and directed one Ed Burgen, named in the complaint herein (who was then and there a locomotive fireman in its employ), to fire one of its steam locomotive engines, #1151, which was then and there about to proceed, and which did thereafter, as hereinafter related, proceed to pull a certain [35] freight train of said defendant, commonly called a way freight train, from said station or town of Hillyard, on that portion of said defendant's railway commonly called its Spokane Division, over and across a portion of said Spokane Division of said defendant to the station or town of Laclede, in said State of Idaho, and thence to the station or town of Troy, in the State of Montana, on the Kalispel Division, which said freight train was then and there, and at all times herein mentioned, loaded with commercial freight and property destined for shipment and being shipped and moved except as hereinafter set forth, from points without the State of Montana, and especially from points within the State of Washington, to points within the State of Montana, and that in the movement of said engine and train, said defendant was, and its employees were, and especially the said Ed Burgen, was engaged in the movement of interstate commerce until 9:59 P. M. on said tenth day of July, 1912, and that thereafter said Ed. Burgen was not engaged in or connected with the movement of any train in interstate commerce or otherwise, except as the same may hereafter appear.

3. That at said time and place, the said Edward Burgen, as such fireman and employee responded to said call, and thereupon, as such employee, proceeded to, and did, in accordance with the permission and direction of said defendant fire said locomotive engine at said Hillyard, and without interruption or rest, and without being off duty as such fireman and employee thereafter, throughout the course of the movement and operation of said train from said Hillyard to said Laclede; that said engine so fired and being fired by said Ed Burgen, left said station of Hillyard, at 6 A. M. on said day, and proceeded west-erly over a portion of said Montana Division to and arrived at said station of Laclede at 9:59 P. M. on said day, during the whole of [36] which time the said Ed Burgen was the fireman upon and was engaged in firing the said steam locomotive engine, and thereby in generating the steam by which the said engine was propelled; that thereupon, the said engine and train was run into the siding, or sidetrack, leading out of and into the main line of said defendant's said Spokane Division of its railway tracks at said Station of Laclede, so that thereupon the whole of said train occupied only the said sidetrack, leaving the said main line free and clear for the unobstructed movement of trains approaching, passing through and leaving said station of Laclede, and the switches at each end of said sidetrack were thereupon locked and thereafter remained locked in such a position that said train could not leave said sidetrack, and no train could proceed from said main line to or upon said sidetrack, and thereupon also the brakes

on said engine and train were set so that said engine and train could not move unless said brakes should be released by some person or persons; that thereupon the crew of said train other than the said Ed Burgen having been on duty connected with and having been actually engaged in or connected with the movement of said train for sixteen hours, retired to rest upon said train, and the orders of said train, constituting the orders under which it had any right to proceed or move, and constituting its only orders, were annulled, and said train lost its right to move further without additional instructions being given for the movement thereof, and said train could not move thereafter without additional instructions being given to persons then and there on said train, or thereafter to be on said train, and the crew of said train other than the said Ed Burgen were relieved from any and every duty connected with the movement of said train, or of any train, and were relieved from any and every duty whatsoever and were not thereafter required or permitted by defendant to go [37] on duty and did not thereafter go on duty, and were not thereafter engaged in or connected with the movement of any train until they had had ten consecutive hours off duty of every kind; that said operation of so placing said train on said sidetrack and the events following the same are commonly called, and are hereinafter referred to as "tying up" the said train. That all of the foregoing occurred at or before 10:30 o'clock P. M. on the tenth day of July, 1912, at or before which time the said train was, as aforesaid, tied up on said siding.

4. That after said train was so placed on said siding, and after the same had been tied up as aforesaid, and after 10:30 o'clock P. M. on said day, the said engine or train did not move to any extent whatsoever in either direction but remained stationary on said siding, and no member of its crew, or person on said train, including the said Ed Burgen, received, or was obliged or permitted to receive any order, direction or suggestion with reference to the future movement of said engine or train, and none of the employees thereon, including the said Ed Burgen, after 10:30 o'clock P. M. on said day, were actually or otherwise engaged in or connected with the future movement of said train. Provided, however, and it is hereby expressly stipulated and agreed, between the parties hereto, anything herein to the contrary notwithstanding, that after said 10:30 o'clock P. M. on said tenth day of July, 1912, the said Ed Burgen did remain on said engine continuously after said 10:30 o'clock P. M. until 6:00 o'clock A. M. on July 11th, 1912, during which time he was on duty merely as an engine watchman, and was charged with performing, and did perform, no other duties or work other than the duties and work of an engine watchman, as such duties and work are hereinafter set forth.

5. That the duties of an engine watchman, and the [38] duties with which an engine watchman is and at all times herein mentioned was charged, and the work done by such engine watchman, and the sole function, duty and work of an engine watchman consists, and at all times herein mentioned did con-

sist, merely in watching the quantity of water in the boiler of the engine which he was employed to watch and in replenishing the same so that said engine will and would always have an adequate supply of water whereby steam could be adequately and efficiently and promptly generated, so that when said engine might again be moved or was again to be moved, it could be moved and could move under its own steam and without the delay incident to waiting until the engine should have again developed sufficient steam and likewise to watch the fire in the fire-box of said engine and to replenish the same with fuel, so that the said fire would be kept up to such an extent that steam would be generated so that when it was next desired to move said engine or to have the same moved, the same could be moved or could move without delay by means of the steam so generated and being generated by means of said fire; that the duties of and work done by said engine watchman at the times aforesaid, had nothing to do, directly or indirectly, with the safety of trains or of any person or persons on or about the same, and had merely the effect of keeping the engine, which was being watched, in a condition so that it might be used at any time, and had merely the effect of avoiding the delay and expense incident to putting out fires and draining the engine and thereafter rebuilding said fires and replenishing the water supply of said engine, and putting said engine again in a condition for operation.

6. That said Ed Burgen remained on duty on said engine only as engine watchman and performing

the duties of and doing only the work of an engine watchman, from 10:00 P. M. on said [39] 10th day of July, 1912, until 6:00 A. M. on July 11, 1912, at which time he was relieved by another fireman in the employ of said defendant, who had been sent out on another train by this defendant, from said Hillyard to said Laclede, with no duties to discharge, and in fact, discharging no duties and doing no work in the course of his transportation from said Hillyard to said Laclede, and not on duty during said time, for the sole purpose of relieving said Ed Burgen and for the purpose of firing said engine from said Laclede to said Hillyard, when the remaining crew of said engine and train should have had at least ten consecutive hours off duty; that thereupon and upon the arrival of said other fireman at said Laclede the said Ed Burgen was no longer on duty or engaged in performing duties of any kind whatsoever, and retired to said train for rest, and did not again go on duty or perform duties of any kind until he had had five days off duty; that upon the arrival of said other fireman at said Laclede, and after the remainder of said crew on said engine and train had had at least ten consecutive hours off duty, the said remainder of said crew with said other fireman on said engine, operated said train into Hillyard.

7. That the portion of said line of railroad upon which said train was proceeding was, as aforesaid, a portion of said defendant's Spokane Division of its line of railroad, which said division was at all times herein mentioned in charge of a single superintendent and divided into three districts; the first district

extending from the terminal of Troy westerly to the terminal of Hillyard, a distance of 136 miles; the second district extending from said terminal of Hillyard westerly to the said terminal of Wilson Creek, a distance of 103 miles; and the third district extending westerly from the said terminal of Wilson Creek to the terminal of Leavenworth, a distance of 98.7 [40] miles; that said terminals are located at the distances which usually obtain on transcontinental railroads, in the same character of country and under similar conditions as exist on said Spokane Division; that they are established and maintained with reference to the usual custom of operating railways and the necessity of complying with the reasonable and ordinary conditions in the operation of said railway lines, and with a view to securing efficient operation, render sufficient service to the public, and affording reasonable hours of work and rest for men, under usual and ordinary conditions.

8. That unless said defendant had had said engine watched at said Laclede, it would have been necessary to have drawn the water out of said engine, in order to have prevented the same from seriously and permanently imperiling the usefulness and efficiency of said engine and necessitating serious repairs upon the same being made, and it would have been necessary, also, then and there, and at all times, and in any weather to have dumped the fire in said engine or to have put out said fire; that if said water had been drawn or said fire dumped or put out, said engine could not have again been used until the same had been towed, by

some other engine, to a watertank, where its water supply could again be replenished and likewise could not again be used until its fire had been again rebuilt and sufficient steam had again thereby been generated to move said engine and any train to be attached thereto and the rebuilding of its said fire would alone consume the period of three hours, during which the said engine would necessarily remain idle and could not be used for locomotive purposes.

9. That when no unusual or extraordinary delays were encountered in transportation, it ordinarily occurred on the Spokane Division, and still occurs under the circumstances aforesaid, [41] that by reason of the crews of engines or trains having been engaged in or connected with the movement of trains, it has been and will be necessary to tie up trains in the manner aforesaid at various sidings on said Spokane Division about fifteen times a month throughout said entire Spokane Division, but, by the exercise of reasonable care, defendant has not been able to and cannot ascertain, until close to the time when said train has been, or will be actually tied up, whether or not, or where, said tie-up will be necessary, and experience has shown that said tie-ups have occurred at every one of the stations existing on said Spokane Division of said defendant; that in order to have a person available as an engine watchman, who could reach engines whenever the same should tie up, without the necessity of calling upon the fireman of said engine to do such engine watching, it would be, and during the times aforesaid would have been, necessary for defendant to have such engine

watchmen located along its said Spokane Division at approximately every 20 miles, and this would necessitate, and would have necessitated, employing about fifteen additional engine watchmen for its Spokane Division alone, at an expense of not less than \$50.00 a month for each watchman, or at an additional expense of \$9,000 a year, in order to supply engine watchmen for said Spokane Division alone of said defendant company; that said defendant operates between each of said terminals each month about 970 trains; that in general, the country tributary to said Spokane Division (outside of Hill-yard and Spokane) is, and during all times mentioned was, sparsely settled, and the population of said stations or towns, beginning with Troy in the western part of Montana, to Leavenworth at the western extremity of said Spokane Division, is set forth in the following table, and where in said table an "X" appears, the same indicates that said station or town [42] has a population of less than half a dozen persons, and where the letters "N. P. O." appear opposite said stations, the same indicates that there is no United States postoffice at said stations or towns, and the letters "N. A." indicate that said station and town is of such a character that defendant, exercising a reasonable judgment in that particular, maintains no agent or other representative there:

Name of Station.

Population. Postoffice. Agency.

Troy.

Yakt.

N. P. O. N. A.

Leonia

Name of Station.	Population.	Postoffice.	Agency.
Katka		N. P. O.	N. A.
Crossport.		N. P. O.	N. A.
Bonnors Ferry	1,071		
Moravia	25		N. A.
Naples	75		
McArthur's Spur	15		N. A.
Elmire	25		N. A.
Ewing's Spur	x	N. P. O.	N. A.
Pack River Spur	25	N. P. O.	N. A.
Iola		N. P. O.	N. A.
Caribou Spur		N. P. O.	N. A.
Colburn			N. A.
Bronx		N. P. O.	N. A.
Humbird Spur		N. P. O.	N. A.
Sandpoint	2,993		
Hornby		N. P. O.	N. A.
Pearsons Spur		N. P. O.	N. A.
Wrencoe			N. A.
McKinney Spur			N. A.
Laclede			
Thalma		N. P. O.	N. A.
Priest River	248		
Albany Falls	10	N. P. O.	N. A.
Albany Falls Spur	x	N. P. O.	N. A.
River Spur		N. P. O.	N. A.
Newport	1,199		
Penrith	50		N. A.
Scotia	200		
Graham's Spur		N. P. O.	N. A.
Arctic Ice Co. Spur		N. P. O.	N. A.
Camden	50		N. A.

Name of Station.	Population.	Postoffice.	Agency.
Phoenix Spur	x	N. P. O.	N. A.
Elk	100		
Wash. Mill		N. P. O.	N. A.
Milan	250		
Chattaroy	100		N. A.
Dean			
Davies Spur		N. P. O.	N. A.
Morse		N. P. O.	N. A.
Hillyard	3276		
[43]			
O. W. R & N. Jct.		N. P. O.	N. A.
Spokane	104,402		
S. P. & S. Jct		N. P. O.	N. A.
Fort Wright	600		
Military Spur		N. P. O.	N. A.
Highland		N. P. O.	N. A.
Lyons			N. A.
Galena			N. A.
Espanola	37		N. A.
Waukon	75		N. A.
Edwall	300		
Canby		N. P. O.	N. A.
Bluestem	75		N. A.
Harrington	661		
Morocco		N. P. O.	N. A.
Mohler	75		N. A.
Downs	75		
Lamona	100		N. A.
Nemo		N. P. O.	N. A.
Odessa	885		
Seward		N. P. O.	N. A.

Name of Station.	Population.	Postoffice.	Agency.
Irby	200		
Krupp	250		
Wilson Creek	405		
Wilson Creek Terminal		N. P. O.	
Stratford	90		N. A.
Adrian	75		
Soap Lake	450		
Ephrata	323		
Naylor		N. P. O.	N. A.
Winchester	100		N. A.
Quincy	264		
Crater		N. P. O.	N. A.
Trinidad	75		
Vulcan		N. P. O.	N. A.
Columbia River	150		
Rock Island		N. P. O.	N. A.
Malaga	250		N. A.
Wenatchee	4,050		
Monitor			N. A.
Cashmere	625		
Dryden	50		N. A.
Sherman Spur		N. P. O.	N. A.
Peshastin	50		
Leavenworth	1,551		

10. That said engine and train, in the course of said transportation from Hillyard to said Laclede, encountered the following delays, due to the following causes:

At Hillyard, 1 hour, 15 minutes, in waiting for brakeman, 40 minutes in meeting trains Nos. 1 and 43 and allowing said trains to pass.

At Morse, 20 minutes in meeting train No. 2 and allowing said train to pass, 20 minutes local work.
[44]

At Dean, 45 minutes in meeting trains No. 263 and No. 401 and allowing said trains to pass.

At Milan, 45 minutes local work.

At Elk, 25 minutes in meeting trains Nos. 23 and 44 and allowing said trains to pass; 40 minutes local work.

At Camden, 20 minutes local work.

At Scotia, 25 minutes local work.

At Penrith, 50 minutes in meeting trains Nos. 27 and 2/411 and allowing said trains to pass.

At Newport, 35 minutes in meeting Train No. 3 and allowing said train to pass, 1 hour 20 minutes local work, 40 minutes meeting and passing No. 264.

At Priest River, 30 minutes local work.

Dated this 27th day of May, 1913.

C. H. LINGENFELTER,

Attorney for Plaintiff.

CHARLES S. ALBERT,

HERMAN H. TAYLOR,

Attorneys for Defendant.

[Motion for Judgment in Favor of Defendant.]

This concluded the testimony, and the foregoing constitutes all the testimony in the case. Both parties rested. Whereupon the defendant moved the Court in the following language:

Defendant now challenges the legal sufficiency of the evidence adduced to sustain the cause of action

alleged in the complaint herein, or any other cause of action, and moves the Court to hold, as a matter of law, that the evidence in the case shows that judgment should be rendered and entered herein, in favor of the defendant, and moves that the Court order judgment to be rendered and entered herein, in favor of the defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant, has been proven.

2. That no cause of action against the defendant has [45] been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads, by limiting the Hours of Service of Employees thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of ten o'clock P. M. on July 10, 1912, to the hour of six o'clock A. M. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff herein to recover any judgment against the defendant herein, on account of the cause of action alleged in said com-

plaint, or to allow any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1 of Article XIV of the Amendment to the Constitution of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in [46] this action or in this court, or by reason of any action brought in this court, upon the subject matter of this action, or to allow the above-entitled court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV, in addition

to and amendatory of the Constitution of the United States.

CHARLES S. ALBERT,
THOMAS BALMER,
HERMAN H. TAYLOR,
Attorneys for Defendant.

Whereupon the Court denied the motion of the defendant.

Whereupon it was stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant, as follows:

[Stipulation for Allowance of a Certain Exception or Exceptions.]

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant.

[Exception Taken by Defendant.]

The defendant excepts to the denial by the Court of the motion of the defendant heretofore made and filed herein upon the 10th day of June, 1913, which

motion challenged the legal [47] sufficiency of the evidence adduced to sustain the cause of action alleged in the complaint, and moved the Court to hold that the evidence in the case showed that judgment should be rendered and entered in favor of the defendant, and moved the Court that judgment be rendered and entered in its favor, which exception is allowed by the Court.

FRANK S. DIETRICH,

District Judge.

Whereupon the Court duly allowed said exception.

Thereafter, and upon the 9th day of July, 1913, the Court, by Honorable Frank S. Dietrich, Judge thereof, made and filed in said action his opinion, order and finding in the following language:

Opinion.

DIETRICH, District Judge:

The action is brought to recover the penalty prescribed in what is popularly known as "The Hours of Service Act," (34 Stat. 1415). The act is entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon." The term "employee" is therein defined as meaning "persons actually engaged in or connected with the movement of any train;" and common carriers are thereby prohibited from requiring or permitting any employee to remain on duty for a longer period than sixteen consecutive hours. The Government charges that in the year 1912 the defendant permitted one of its locomotive firemen, Ed Burgen, to remain on duty continuously from 6 o'clock A. M. of July 10th to 6

o'clock A. M. of July 11th, upon a train running from Hillyard in the state of Washington to La Clede in the State of Idaho.

From the written stipulation of facts upon which the cause has been submitted, it appears that the defendant is a common carrier engaged in interstate commerce by railroad in and through the States of Washington, Idaho and Montana. Upon July 10, 1912, it directed Burgen, one of its locomotive firemen, to [48] fire its locomotive engine which was to pull, and did pull, a freight train carrying commodities moving in interstate commerce, from Hillyard to Laclede, over what is known as the Spokane division of the defendant's railway system. He began firing and the train left the station of Hillyard at 6 o'clock A. M. on July 10th, and he continued to discharge his duties as fireman while the train was moving to Laclede, at which point it arrived at 9:59 o'clock P. M. of the same day, a period of 15 hours and 59 minutes. Upon the arrival of the train at Laclede it was run into the siding or sidetrack leading out of and into the main line of the defendant's main track, and thereupon it occupied only the sidetrack, leaving the main line clear for the unobstructed movement of trains approaching and passing through Laclede station. The switches at each end of the sidetrack were thereupon locked, and thereafter remained locked in such position that the train could not leave the side track, and no other train could pass from the main line to and upon the side track. The brakes were set so that neither the train nor the engine could move without first releas-

ing the brakes. After the train was thus "tied up," as the process is called, at 10:30 o'clock P. M. on July 10th, it remained stationary on the siding, and no member of its crew, including Burgen, received or was obliged or permitted to receive any order with reference to the future movement of the train or engine. Burgen, however, was permitted and required to remain upon the engine continuously thereafter, until 6 o'clock the next morning, during which time he was on duty as an engine watchman, charged with the performance of no other duty or work than that of engine watchman. These duties consisted of watching the quantity of water in the boiler of the engine and in replenishing the same so that the engine would always have an adequate supply of water whereby steam could be efficiently and promptly generated, so that when the engine was again to be moved it could be moved under its own steam, and without the delay incident to waiting until steam could be generated afresh; and in watching the fire in the fire box, and replenishing the same with fuel, so that there would always be a sufficient fire to generate steam.

At six o'clock in the morning of July 11th Burgen was relieved by another fireman, and thereupon he retired to the train for rest, and did not again go on duty or perform duties of any kind until after he had five days of rest.

From this abstract of the facts, as stipulated, it appears that Burgen was actually engaged as fireman a little less than 16 hours, but as fireman and engine watchman he was on duty continuously for

24 hours, and the question for determination therefore is, whether, under the circumstances, his service as engine watchman brings the case within the statute. Conceding, as urged, but not deciding, that Burgen's service as engine watchman was not directly or indirectly connected with the movement of the train, he was primarily a locomotive fireman, and, as such, an "employee," as defined by the act, and was, therefore, [49] subject to its operation. The defendant takes the position that by temporarily turning aside from his regular duty, the employee becomes and for the time being, remains exempt; but to this view I am unable to assent. While the statute is susceptible to such a construction, its prohibition is not, in terms at least, limited to service having to do directly or indirectly with the movement of trains. The language of the second section is: "It shall be unlawful * * * * to permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours." There is here no express limitation of the operation of the act to a specific duty or class of duties; the limitation is rather to a class of employee, namely, those "actually engaged in or connected with the movement" of trains. The act must therefore be construed, and being remedial in its nature it must receive such construction as will give to its general purpose reasonable effect. *United States vs. Kansas City S. Ry. Co.*, 189 Fed. 471. *United States vs. Missouri Pacific Ry. Co.* (decided by District Court for District of Kansas March 22, 1913). Now, the defendant's position is

that the time Burgen was engaged in watching the engine is not to be counted, because, during such period, he was performing a duty having no connection with the movement of any train. Plainly in that view the test, and the only test, is the relation of the specific service to the movement of trains. Logically, therefore, it is wholly immaterial whether the service as watchman follows or precedes the service as fireman, or intervenes. It has no more connection with the movement of trains in the one case than in the other, and if want of such connection operates to exclude it from consideration it is to be excluded the same in one case as in another. But clearly the purpose of the act could in part be very easily frustrated if an employee could be lawfully kept on watch for eight hours, and [50] then immediately be required to fire an engine in transit for 15 hours and 59 minutes; or if he could be required to fire for eight hours, then watch for eight hours, and then fire again for eight hours, all consecutively. It is not to be assumed that such a contingency, which is entirely possible under the construction urged by the defendant, was contemplated in the passage of the act. True, the violation of the spirit of the statute is more apparent in such a case, where the service as watchman precedes the service as fireman than where, as here, it follows such service, but the difference is one of degree only, and the Courts cannot with nicety distinguish between service which materially impairs and that which impairs only to an inappreciable extent the efficiency of a trainman. That 24 hours of

continuous service, without sleep, is unnatural cannot be gainsaid, and that if persisted in for any considerable length of time, even with liberal intervals of rest, it might injuriously affect the trainman's efficiency is not unreasonable to believe. I cannot avoid the conclusion that it was the intent and purpose of Congress that men charged with the responsibility of safely moving trains in interstate commerce should not be required or permitted to work continuously for more than 16 hours at any one time. It has been suggested that the carrier has no power to compel its employees to rest, and when given the opportunity for rest they may use the time in laboring upon their own account or for some other employer, but such a contingency is remote in the extreme; at least it is one with which we are not presently concerned. Without further discussion, my conclusion is that, under a proper construction of the act, locomotive firemen, engineers, conductors, and other members of train crews, being "employees" as that term is defined, cannot be permitted to be on duty for more than 16 consecutive hours, regardless of the question whether such duty consists in whole or only in part of work directly [51] connected with the movement of trains. In this view, and upon the facts stipulated, it must be held that the defendant is guilty.

As to the penalty, I entertain no doubt that the defendant acted in good faith, upon the belief that it was not violating the law, and it is therefore thought that a fine of \$100.00 will satisfy the ends

of justice. Judgment will be entered for that amount.

Whereupon, it was stipulated and agreed by and between the plaintiff and the defendant as follows:

[Stipulation for Allowance of Certain Exceptions.]

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Defendant.

[Exceptions Taken by Defendant.]

Defendant excepts to the finding by the Court that it, the defendant, was guilty of the violation of the Act of Congress known as the Hours of Service Act, entitled, "An act to Promote the Safety of Employees and Travelers upon Railroads by limiting the Hours of Service of Employees thereon", found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415, and 1416, approved March 4, 1907, as charged in the complaint herein, which exception is allowed by the Court.

Defendant excepts to the order of the Court, imposing a fine of one hundred dollars upon it for said alleged violation of said Hours of Service Act, which exception is allowed by the [52] court.

Defendant excepts to the finding by the court, in favor of the plaintiff herein, assessing a fine upon said defendant in the sum of one hundred dollars, which exception is allowed by the court.

FRANK S. DIETRICH,

District Judge.

Whereupon said exceptions were allowed by the Court.

Thereafter and upon the 14th day of July, 1913, judgment was entered in favor of the plaintiff and against the defendant, in the following language:

[Title of Court and Cause.]

Judgment.

This cause came on regularly to be heard before the Honorable Frank S. Dietrich, Judge, the plaintiff appearing by C. H. Lingenfelter, United States Attorney, and the defendant appearing by Charles S. Albert, attorney for defendant. A trial by jury having been expressly waived and stipulation of the facts having been filed by the respective parties, and after argument of counsel, and the Court being fully advised in the premises, found for the plaintiff and assessed the fine at \$100.00.

It is, therefore, ordered and adjudged that the plaintiff, United States, have and recover from the defendant the sum of \$100.00, together with costs taxed at \$44.96.

Dated this 14th day of July, 1913.

[Stipulation for Allowance of a Certain Exception.]

Whereupon it was stipulated and agreed by and between the [53] plaintiff and defendant as follows:

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Defendant.

[Exception Taken by Defendant.]

Defendant excepts to the rendering and entering of the judgment in the above-entitled action, ordering and adjudging that the plaintiff herein have and recover from the defendant the sum of one hundred dollars, together with costs, dated and entered on the 14th day of July, 1913, and to said judgment, which exception is allowed by the Court.

FRANK S. DIETRICH,
District Judge.

Whereupon said exception was duly allowed by the Court. [54]

[Title of Court and Cause.]

**Stipulation [for Settlement and Allowance of Bill
of Exceptions].**

IT IS HEREBY STIPULATED, that the foregoing is conformable to the truth and contains all the evidence offered or introduced at the trial of the above-entitled action, and also the findings of the Court in full and all objections, rulings, orders and all other proceedings had upon said trial, and that the same shall be settled and allowed as the settled case and bill of exceptions herein by the Honorable Frank S. Dietrich, Judge of said Court, without further notice.

C. H. LINGENFELTER,
Attorney for the United States.

By CAVANEY,
Assistant.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant. [55]

**[Certificate and Order Settling and Allowing Bill of
Exceptions.]**

[Title of Court and Cause.]

I HEREBY CERTIFY that the foregoing case and bill of exceptions has been examined by me and found conformable to the truth, and contains all the evidence offered or introduced on the trial of said cause, and also the findings of said Court in full, and

all objections, rulings, orders and all other proceedings had upon said trial, and I hereby settle and allow the same as the settled case and bill of exceptions herein.

Dated at Boise, Idaho, August 2, 1913.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed, August 2, 1913. A. L. Richardson, Clerk. [56]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

Defendant in the above-entitled cause feeling itself aggrieved by the findings of the Court and the judgment entered on the 14th day of July, 1913, comes now by Charles S. Albert, Herman H. Taylor and Thomas Balmer, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made, fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Defendant.

Due service of the within Petition by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [57]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, from the findings and the judgment made by this Honorable Court on the 9th day of July, A. D 1913, in the above-entitled cause:

I.

That the United States District Court, in and for the District of Idaho, Northern Division, erred in denying the motion of the defendant, that the Court hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of said defendant.

II.

That the said Court erred in denying the motion of the defendant that judgment be rendered and en-

tered in said action in favor of said defendant.

III.

That the Court erred in overruling and denying the motion made by said defendant at the close of all the testimony, that the Court hold, as a matter of law, that the evidence in the [58] case shows that judgment should be rendered and entered in favor of said defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant, has been proven.

2. That no cause of action against the defendant has been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employees thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of ten o'clock P. M. on July 10, 1912, to the hour of six o'clock A. M. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff to recover any judgment against the defendant herein, on account of the cause of action alleged in said complaint, or to allow

any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the Hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1 of Article XIV of the Amendment to the Constitution [59] of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action, or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in this action or in this court, or by reason of any action brought in this Court, upon the subject matter of this action, or to allow the above-entitled Court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV, in addition to and amendatory of the Constitution of the United States.

IV.

That the said Court erred in finding that the defendant was guilty of a violation of the Act of Congress, known as the Hours of Service Act, entitled,

“An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employees thereon,” found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

V.

That the Court erred in ordering judgment to be entered herein, and imposing a fine of one hundred dollars upon said defendant.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District [60] Court of the United States for the District of Idaho, Northern Division, be reversed, and that said District Court be directed to grant a new trial of said cause.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Plaintiff in Error, Defendant in the
Lower Court.

Due service of the within Assignment of Errors by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [61]

Order Allowing Writ of Error.

At a stated term, to wit, the May Term, A. D. 1913, of the District Court of the United States of America of the Ninth Judicial Circuit, in and for the District of Idaho, Northern Division, held at the courtroom in the City of Boise, Idaho, on the 2d day of August, in the year of our Lord 1913. Present, Hon FRANK S. DIETRICH, District Judge.

[Title of Court.]

Upon motion of Charles S. Albert, Herman H. Taylor and Thomas Balmer, Esqs., attorneys for defendant and upon filing a petition for writ of error and an assignment of errors:

IT IS ORDERED, that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at five hundred dollars, which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending [62] the determination of such writ of error.

FRANK S. DIETRICH,
District Judge.

Due service of the within Order by a true copy

thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [63]

[Title of Court and Cause.]

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the findings, decision and judgment thereon, made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed:

NOW, THEREFORE, IT IS ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this Court, a good and sufficient bond in the sum of five hundred dollars, to the effect that if the said defendant, Great Northern Railway Company, plaintiff in error, shall prosecute said writ of error to effect, and answer all

damages and costs if it fails to make its plea good, then the said obligation [64] to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 2d day of August, 1913.

FRANK S. DIETRICH,
District Judge.

Due service of the within order by a true copy thereof is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [65]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of five hundred dollars, to be paid to the United States of America, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 2d day of August, 1913.

WHEREAS, lately at the May Term A. D. 1913 of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America, plaintiff, and Great Northern Railway Company, defendant, a final judgment was rendered against the said defendant, and the said defendant, Great Northern Railway Company having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said United States of America is about to be issued, citing and admonishing it to be and appear at the United States [66] Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if the said Great Northern Railway Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY,

By CHARLES S. ALBERT,
THOMAS BALMER,
HERMAN H. TAYLOR,

Its Attorneys.

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY,

By JAMES A. BROWN,

Resident Vice-President.

S. A. MITCHELL,

Resident Assistant Sec'y.

Plaintiff is satisfied with the within bond and the surety thereon.

C. H. LINGENFELTER,

Attorney for Plaintiff.

By CAVANEY,

Assistant.

The foregoing bond is approved as to form, amount and sufficiency of surety this 2d day of August, 1913.

FRANK S. DIETRICH,

Judge of the United States District Court, Northern District of Idaho.

Due service of the within Bond by a true copy thereof is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [67]

[Title of Court and Cause.]

Stipulation as to Making of Record.

IT IS HEREBY STIPULATED between the plaintiff by its attorney and the defendant, by its attorneys, that the transcript of the record on the writ

of error in the above-entitled cause shall be made up of the following papers:

Summons and Complaint.

Answer.

Agreed Statement of Facts.

Motion of Defendant for Judgment in Favor of Defendant.

Opinion and Finding of the Court and Order for Judgment.

Judgment.

Stipulation for and Bill of Exceptions.

Order Settling Bill of Exceptions.

Petition for Order Allowing Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error.

Order Fixing and Allowing Bond.

Bond on Writ of Error.

Writ of Error.

Citation and Admission of Service.

Stipulation as to Making Up Record.

Defendant's Exceptions and Stipulations.

Dated this 2d day of August, 1913.

C. H. LINGENFELTER,

Attorney for Defendant in Error and Plaintiff,
United States of America.

CHARLES S. ALBERT,

THOMAS BALMER,

HERMAN H. TAYLOR,

Attorneys for Plaintiff in Error and Defendant,
Great Northern Railway Company.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [68]

[Title of Court and Cause.]

Stipulation as to Printing Record.

IT IS HEREBY STIPULATED AND AGREED between the plaintiff in error, by its attorney, and defendant in error, by its attorney, that in printing the record in the above-entitled cause, the clerk shall cause the following to be printed for consideration of said court on appeal:

Summons and Complaint.

Answer.

Stipulation for and Bill of Exceptions.

Order Settling Bill of Exceptions.

Petition for Order Allowing Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error.

Order Fixing and Allowing Bond.

Bond on Writ of Error.

Writ of Error.

Citation and Admission of Service.

Stipulation as to Making Up Record.

And it is further stipulated, that in printing said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said title of court and cause there be inserted in the place and instead thereof, the following words: "Title of Court and Cause." [69]

Dated this 2d day of August, 1913.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Plaintiff in Error and Defendant,
Great Northern Railway Company.

C. H. LINGENFELTER,
Attorney for Defendant in Error, and Plaintiff,
United States of America.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [70]

[Writ of Error (Original).]

The President of the United States of America, to
the Honorable, the Judge of the District Court
of the United States for the District of Idaho,
Northern Division, Greeting:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea, which is in
the said District Court before you at the May term
1913 thereof, between United States of America,
plaintiff, and Great Northern Railway Company, de-
fendant, a manifest error hath happened, to the great
damage of the said Great Northern Railway Com-
pany, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been,
should be duly corrected and full and speedy justice
done to the parties aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid and all things con-

cerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California on the 29th day of August next, in the said Circuit Court of Appeals to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 2d day of August, 1913, of the Independence of the United States the one hundred thirty-eighth year.

[Seal]

A. L. RICHARDSON,

Clerk of the District Court for the District of Idaho,
Northern Division. [73]

Allowed by

FRANK S. DIETRICH,

District Judge.

Service of the within writ of error and receipt of a copy thereof, is hereby admitted this 2d day of August, 1913.

C. H. LINGENFELTER,

Attorney for Defendant in Error. [74]

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern Division. United States of America, Plaintiff, vs. Great Northern Ry. Co., Defendant. Writ of Error. Filed Aug. 2, 1913. A. L. Richardson, Clerk.
[75]

[Citation on Writ of Error (Original).]

The President of the United States, to the United States of America and C. H. Lingenfelter, Its Attorney, Greeting.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein United States of America is plaintiff and you are defendant in error and the said Great Northern Railway Company is defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 2nd day of August, A. D. 1913, on the Independence of the United States the one hundred thirty-eighth year.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho, Northern Division.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [76]

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern

Division. United States of America, Plaintiff, vs. Great Northern Ry Co., Defendant. Citation. Filed Aug. 2d, 1913. A. L. Richardson, Clerk. [77]

Due service of the within citation by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [78]

[Endorsed]: No. 2310. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Received and filed August 25, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY,	}
Plaintiff in Error,	
vs.	
UNITED STATES OF AMERICA,	
Defendant in Error.	}

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This case comes before this Court upon a Writ of Error to the Northern Division of the District Court of the United States for the District of Idaho, the plaintiff in error being the defendant in the Court below. Hon. Frank S. Dietrich, District Judge, presided over the trial.

The action was brought under the Hours of Service Act (34 Statutes at Large, p. 1415), to recover a penalty for the use of fireman Ed Burgen on the

10th and 11th days of July, 1912. It was claimed that the defendant had used its fireman, Ed Burgen, for more than sixteen consecutive hours, from 6 o'clock a. m., July 10, 1912, to 6 o'clock a. m., July 11, 1912, Burgen being a fireman on Extra 1511. (*Record p. 2*).

Defendant by its answer admitted its incorporation, operation through Idaho, and the fact that it was at times engaged in interstate commerce, but denied that it permitted Burgen to remain on duty as a fireman for a longer period than sixteen consecutive hours, or that he was engaged in or connected with the movement of defendant's extra train 1151, or the movement of any train engaged in interstate traffic, after the expiration of sixteen hours. (*R. p. 5*).

The case came on for trial before Judge Dietrich on June 10, 1913, at Coeur d'Alene, Idaho, and was tried upon an agreed statement of facts. (*R. p. 8*).

Upon the conclusion of the trial the defendant moved the Court to hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of the defendant, Great Northern Railway Company, plaintiff in error here, upon the grounds that no cause of action had been proven under the Hours of Service Act, and that during the time for any period in excess of sixteen hours he was not actually engaged in or connected with the movement of any train, nor did he remain on duty. The defendant below contended that to allow the plaintiff to recover any judgment would be contrary to the provisions of the act, and

would deprive it of its property, without due process of law, contrary to the provisions of Article 5 and of Section 1 of Article 14 of the Amendments to the Constitution of the United States. (*R. p. 22*).

The motion was denied and exception allowed. (*R. p. 25*).

Judge Dietrich filed an opinion (*R. p. 25*), finding that the defendant was guilty of a violation of the act, and ordered judgment to be entered against the defendant for one hundred dollars. Exceptions were taken to the finding that the defendant was guilty of a violation of the act, to the order of the Court imposing a fine of one hundred dollars upon it, and to the finding assessing such fine. (*R. p. 32*).

Judgment was entered upon the order and finding, to which exception was duly taken. (*R. p. 34*).

The Bill of Exceptions was stipulated to, and order made settling it. (*R. p. 35*). Thereafter a writ of error was duly petitioned for, assignment of errors filed, and order made allowing writ of error. The case is now before this Court upon such writ of error. (*R. pp. 41-55*).

STATEMENT OF FACTS.

The facts in the case were all stipulated, both parties reserving the right to make objections upon the trial, but making no objections when the case was tried. (*R. p. 9*).

The stipulation shows these facts.

The Great Northern Railway Company is a common carrier, engaged in interstate commerce in the State of Idaho. At Hillyard, Washington, on July 10, 1912, at 6 o'clock a. m., it called Ed Burgen, a fireman, to fire engine 1151, attached to a way freight train from Hillyard, on the Spokane division, to LaClede, Idaho, and thence to Troy, Montana. Both the defendant and its fireman Burgen were engaged in interstate commerce until 9:59 p. m. on July 10, 1912, and it was agreed that after that he was not engaged in or connected with the movement of any train in interstate commerce, except as might further appear under the agreed facts. (*R. p. 10*). Burgen fired his engine at Hillyard, and thereafter to LaClede, where the train arrived at 9:59 on the same day (which was just within the sixteen hours).

Thereupon, the said engine and train was run into the siding or sidetrack, leading out of and into the main line of said defendant's said Spokane division of its railway tracks at said Station of LaClede, so that thereupon the whole of said train occupied only the said sidetrack, leaving the said main line free and clear for the unobstructed movement of trains approaching, passing through and leaving said station of LaClede, and the switches at each end of said

sidetrack were thereupon locked and thereafter remained locked in such a position that said train could not leave said sidetrack, and no train could proceed from said main line to or upon said sidetrack, and thereupon also the brakes on said engine and train were set so that said engine and train could not move unless said brakes should be released by some person or persons; that thereupon the crew of said train other than the said Ed Burgen, having been on duty connected with and having been actually engaged in or connected with the movement of said train for sixteen hours, retired to rest upon said train, and the orders of said train, constituting the orders under which it had any right to proceed or move, and constituting its only orders, were annulled, and said train lost its right to move further without additional instructions being given for the movement thereof, and said train could not move thereafter without additional instructions being given to persons then and there on said train, or thereafter to be on said train, and the crew of said train, other than the said Ed Burgen, were relieved from any and every duty connected with the movement of said train, or of any train, and were relieved from any and every duty whatsoever and were not thereafter required or permitted by defendant to go on duty and did not thereafter go on duty, and were not thereafter engaged in or connected with the movement of any train until they had had ten consecutive hours off duty of every kind; that said operation of so placing said train on said sidetrack and the events

following the same are commonly called, and are hereinafter referred to as "tying up" the said train. All of the foregoing occurred at or before 10:30 o'clock p. m. on the tenth day of July, 1912, at or before which time the said train was, as aforesaid, tied up on said siding.

After said train was so placed on said siding, and after the same had been tied up as aforesaid, and after 10:30 o'clock p. m. on said day, the said engine or train did not move to any extent whatsoever in either direction, but remained stationary on said siding, and no member of its crew, or person in said train, including the said Ed Burgen, received, or was obliged or permitted to receive any order, direction or suggestion with reference to the future movement of said engine or train, and **none of the employees thereon, including the said Ed Burgen, after 10:30 o'clock p. m. on said day, were actually or otherwise engaged in or connected with the future movement of said train.** Provided, however, and it is hereby expressly stipulated and agreed, between the parties hereto, anything herein to the contrary notwithstanding, that after said 10:30 o'clock p. m. on said tenth day of July, 1912, the said Ed Burgen did remain on said engine continuously after said 10:30 o'clock p. m. until 6:00 o'clock a. m. on July 11th, 1912, during which time he was on duty merely as an engine watchman, and was charged with performing, and did perform, no other duties or work other than the duties and work of an engine watchman, as such duties and work are hereinafter set forth.

It was then agreed as to the subsequent period that the duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains or of any person or persons on or about the same, and had merely the effect of keeping the engine, which was being watched, in a condition so that it might be used at any time, and had merely the effect of avoiding the delay and expense incident to putting out fires and draining the engine and thereafter rebuilding said fires and replenishing the water supply of said engine, and putting said engine again in a condition for operation. (R. p. 14).

Burgen finished his work as engine watchman at 6 o'clock a. m., July 11, 1912, when another fireman came out and took the engine, firing the same from LaClede to Hillyard. Burgen retired to the train for rest, and did not again perform duty of any kind until he had five days off duty. The remainder of the crew had ten consecutive hours off duty, and then operated the train with a new fireman into Hillyard. (R. p. 15).

The Spokane division is divided into three districts. First, Troy to Hillyard, 136 miles; second, Hillyard to Wilson Creek, 103 miles; third, Wilson Creek to Leavenworth, 98.7 miles. These terminals are located at the distances which usually obtain on transcontinental railroads, in the same character of country and under similar conditions as exist on said Spokane division. They are established and maintained with reference to the usual custom of operating railways and the necessity of complying with the reasonable and ordinary conditions in the operation of said railway lines, and with a view to securing efficient opera-

tion, render sufficient service to the public, and affording reasonable hours of work and rest for men, under usual and ordinary conditions. (*R. p. 16*).

It was further agreed that unless said defendant had had said engine watched at said LaCledé, it would have been necessary to have drawn the water out of said engine, in order to have prevented the same from seriously and permanently imperiling the usefulness and efficiency of said engine and necessitating serious repairs upon the same being made, and it would have been necessary also, then and there, and at all times, and in any weather to have dumped the fire in said engine or to have put out said fire; that if said water had been drawn or said fire dumped or put out, said engine could not have again been used until the same had been towed, by some other engine, to a water tank, where its water supply could again be replenished and likewise could not again be used until its fire had been again rebuilt and sufficient steam had again thereby been generated to move said engine and any train to be attached thereto, and the rebuilding of its said fire would alone consume the period of three hours, during which the said engine would necessarily remain idle and could not be used for locomotive purposes. (*R. p. 17*).

Ordinarily, it occurs on the Spokane division there are about fifteen tieups a month to comply with the sixteen hour law. By the exercise of reasonable care, defendant has not been able to and cannot ascertain, until close to the time when said train has been, or will be actually tied up, whether or not, or where,

said tieup will be necessary, and experience has shown that said tieups have occurred at every one of the stations existing on said Spokane division of said defendant; that in order to have a person available as an engine watchman, who could reach engines whenever the same should tie up, without the necessity of calling upon the fireman of said engine to do such engine watching, it would be, and during the times aforesaid would have been, necessary for defendant to have such engine watchmen located along its said Spokane division at approximately every 20 miles, and this would necessitate, and would have necessitated, employing about fifteen additional engine watchmen for its Spokane division alone, at an expense of not less than \$50.00 a month, for each watchman, or at an additional expense of \$9,000 a year, in order to supply engine watchmen for said Spokane division alone of said defendant company; that said defendant operates between each of said terminals each month about 970 trains. (*R. pp. 17, 18*).

In general, the country tributary to the Spokane division, outside of Hillyard and Spokane, is very sparsely settled, and the stpopulation shows that of the 88 stations on this divison, there are 35 of them which have no postoffice, nor are there agents at 55. There are only six of them which have a population of over 1,000 inhabitants, a great many of them having nothing at the station but a signboard. (*R. pp. 18-21*).

The delays encountered between Hillyard and LaClede were due to the following causes:

At Hillyard, 1 hour, 15 minutes, in waiting for brakeman, 40 minutes in meeting trains Nos. 1 and 43 and allowing said trains to pass.

At Morse, 20 minutes in meeting train No. 2 and allowing said train to pass, 20 minutes local work.

At Dean, 45 minutes in meeting trains No. 263 and No. 401 and allowing said trains to pass.

At Chattaroy, 20 minutes local work.

At Milan, 45 minutes local work.

At Elk, 25 minutes in meeting trains Nos. 28 and 44 and allowing said trains to pass; 40 minutes local work.

At Camden, 20 minutes local work.

At Scotia, 25 minutes local work.

At Penrith, 50 minutes in meeting trains Nos. 27 and 2/411 and allowing said trains to pass.

At Newport, 35 minutes in meeting train No. 3 and allowing said train to pass, 1 hour 20 minutes local work, 40 minutes meeting and passing No. 264.

At Priest River, 30 minutes local work. (*R. p.* 21, 22).

SPECIFICATION OF ERRORS.

The following errors specified, which are relied upon, each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record. (*R. p. 37*).

I.

That the United States District Court in and for the District of Idaho, Northern Division, erred in denying the motion of the defendant, that the Court hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of said defendant. (*Record, p. 37; Assignment of Error No. 1*).

II.

That the Court erred in denying the motion of the defendant that judgment be rendered and entered in said action in favor of said defendant. (*Record, p. 38; Assignment of Error No. 2*).

III.

That the Court erred in overruling and denying the motion made by said defendant at the close of all the testimony, that the Court hold, as a matter of law, that the evidence in the case shows that judgment should be rendered and entered in favor of said defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant has been proven.

2. That no cause of action against the defendant has been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employes and Travelers upon railroads, by limiting the Hours of Service of Employes thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to-wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of 10 o'clock p. m. on July 10, 1912, to the hour of 6 o'clock a. m. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff to recover any judgment against the defendant herein, on account of the cause of action alleged in said complaint, or to allow any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the Hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1

of Article XIV. of the Amendment to the Constitution of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action, or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in this action or in this Court, or by reason of any action brought in this Court, upon the subject matter of this action, or to allow the above entitled Court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV., in addition to and amendatory of the Constitution of the United States. (*Record pp. 3839; Assignment of Error No. 3*).

IV.

That the said Court erred in finding that the defendant was guilty of a violation of the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employes thereon," found in 34 U. S. Statutes, at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907. (*Record, p. 39; Assignment of Error No. 4*).

V.

That the Court erred in ordering judgment to be entered herein, and imposing a fine of one hundred dollars upon said defendant. (*Record p. 40; Assignment of Error No. 5*).

ARGUMENT.

I.

IN USING A FIREMAN AS A WATCHMAN, THE RAILWAY COMPANY DID NOT REQUIRE OR PERMIT A PERSON ACTUALLY ENGAGED IN OR CONNECTED WITH THE MOVEMENT OF A TRAIN, TO BE OR REMAIN ON DUTY FOR A LONGER PERIOD THAN SIXTEEN CONSECUTIVE HOURS.

The Railway Company was charged with a violation of the Hours of Service or Sixteen Hour Act, in permitting or requiring an employe to be or remain on duty for a longer period than sixteen consecutive hours. Such employes are defined by the act to mean, "persons actually engaged in, or connected with the movement of any train."

The agreed facts show that Burgen, a fireman, fired his engine for nearly sixteen hours, from 6 o'clock a. m. to 9:59 p. m. on July 10, 1912; that the engine and train were then placed on a sidetrack; that the main line was left clear, the switches were locked so that the train could not leave the sidetrack or any train proceed upon it, the brakes were set, the rest of the crew retired for rest, all orders for the train were annulled, the train lost its right to

move further without additional instructions, and that the train was tied up. It was further specifically agreed that the train did not move to any extent whatever, but remained stationary on the siding, no orders were received by Burgen, nor was he obliged or permitted to receive them. After he began his work as a watchman, it was expressly agreed **that none of the employes, including Burgen, were actually, or otherwise, engaged in, or connected with the future movement of said train**, but that he was on duty as an engine watchman, which duties required him to watch the quantity of water in the boiler and to replenish the same, so that when it came time to move the engine it could be done without delay, and also to watch the fire in the firebox and replenish it, to generate the steam, without the necessity of re-kindling the fire. (*R. p. 10-13*).

It was agreed that:

The duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains, or of any person or persons on or about the same, but that it had the mere effect of keeping the engine in condition to be used at any time, and avoid the delay and expense of putting out fires and draining the engine thereafter, rebuilding the fire and replenishing the water supply. Burgen was relieved at 6 o'clock a. m. on July 11, and did not go back to work for five days. (*R. p. 13-15*).

The question here involved is whether Burgen, at the time he was watching the engine, was actually

engaged in, or connected with the movement of a train.

The learned trial judge took the position that because Burgen was a "fireman," that it made no difference what he was doing at the time of the alleged violation, he must be an employe within the meaning of the act, for the reason that a fireman's duties are such as usually connect him with the movement of the train, and that if the fireman had been used in connection with the movement of a train for sixteen hours, he could not do any further work until after the expiration of ten hours of rest.

This construction comes within neither the language nor the meaning of the statute. The act prohibits the permitting of an employe, actually engaged in, or connected with the movement of a train, to be or remain on duty for a longer period than sixteen consecutive hours. The duty prohibited is that of being actually engaged in, or connected with the movement of any train. He is not allowed to remain on such duty when his work, as is stipulated in this case, had nothing to do with the movement of any train. Consequently, Burgen was not permitted or required to remain on duty, within the meaning or language of the statute.

This construction of the statute is emphasized by the language of Section 2 of the act, by which it is stated that whenever any *such* employe shall have been continuously on duty for sixteen consecutive hours, he shall be relieved, and not required or per-

mitted again to go on duty until he has had at least ten consecutive hours off duty.

It is urged by the Government, and that is the position taken by the Court below, that the purpose of the act was to relieve the employes engaged in, or connected with the movement of a train from further service of any kind, after the expiration of sixteen hours, in order that the trainman's efficiency might not be impaired by anything which would interfere with his rest between the hours of service.

We do not contend that it is within the power of the railroad to return the fireman to work after ten hours have intervened between the time he exercised his duty as a fireman and the time he returned to such duty again. We do contend that the purpose of the act was to prevent any continuous, arduous service by the engine or train crew, beyond sixteen hours, in their duties as such engine men or train men, so that their efficiency might be thereby lessened to do the very acts and duties in which their efficiency should be the highest, and which have the most to do with the safety of persons and property. The evil sought to be remedied by the act was the use of these men for twenty-four or thirty-six hours at a stretch, when during all this time persons and property were subject to the efficient discharge of their duties as engine men and train men. The statute was passed for the purpose of eliminating such service, in connection with the movement of any train, after the expiration of sixteen hours. When the subsequent service has no such connection, then the object of

the statute is not defeated, and if, as in this case, the man has a long period of rest before again assuming the duties of fireman, certainly his efficiency for operating, while engaged in or connected with the movement of a train, is not impaired.

If the contention of the Government is correct, then it is incumbent upon the Railway Company, not only to refrain from allowing its train employes to do any work of any kind after the expiration of sixteen hours, but to see to it that they rest and refrain from doing anything which will interfere with their efficiency when on duty.

The stipulated facts emphasize the distinction between the case at bar and the decisions upholding the infliction of penalties for requiring employes to work more than sixteen hours.

"The duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains, or of any person or persons on or about the same." (*R. p. 14*).

"None of the employes thereon, including said Ed Burgen, after 10:30 o'clock p. m. on said date, were actually, or otherwise, engaged in or connected with the future movement of said train." (*R. p. 13*).

The case principally relied upon by the Government and cited as authority by the Court below in its opinion is that of *U. S. v. Missouri Pacific Ry. Co.*, decided by the District Court of Kansas, March 22, 1913. (----- Fed. -----). This case

is readily distinguishable from the instant case, but the language used by the Court demonstrates that it was not the purpose of Congress to include in the purview of the act, persons not actually engaged at the time of the alleged violation in the movement of trains.

In that case a fireman was used as an engine watchman, while his engine was on the main line and being pulled by another engine. The Court very properly held that the fireman was connected with the movement of a train. But the Court said:

“The humane feature of the statute being considered, it must be thought that Congress intended, at or before the expiration of the sixteen hour period of service provided therein, *an employe engaged in the movement of the train* would, from exhaustion of body and mind, be in need of relaxation and rest, freed from all responsibility and care for the safety of himself and others. * * *

“Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employe himself, *and looking alone to the safety of the employes and others*, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep, he should permit the water in the boiler to be entirely consumed, the danger from wreck of the train or other disaster by explosion, involving himself and others, is apparent.”

This construction of the act shows very plainly that its purpose was one of safety. And when it is stipulated, as it is in this case, that the duties and work done by the engine watchman had nothing to do with the safety of the train or persons, the reason for holding a fireman engaged as an engine watchman within the prohibition does not exist. The

language of Judge Pollock in this Missouri Pacific case clearly shows that the act was intended to apply to those employes only who are actually engaged at the time, in the movement of trains, and whose continued employment would endanger the safety of persons or property. This position is supported by the reports of the Interstate Commerce Commission, published prior to the passage of the act, and upon whose recommendation the act was passed.

“The part played by excessive hours of labor in causing railroad accidents is a question that calls for serious consideration. The bulletins published by the commission record many accidents, where the employes involved had been on duty an excessive number of hours, and many complaints from employes that they had been required to work for excessive periods of time have been brought to the attention of the commission. There are a few roads that have stringent rules, to guard against the overworking of trainmen, but in most cases the matter is left entirely to the discretion of the men and to subordinate officials immediately in charge. These subordinate officials, in their eagerness to keep traffic moving, frequently overtax the men, and in many cases the men themselves, through greed for making big pay willingly remain on duty for excessive periods of time. If there is a reason for limiting the hours of labor in any employment, it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent upon the alertness and intelligence of train employes.”

Eighteenth Annual Report of the Interstate Commerce Commission for the year 1904, p. 105.

“The Hours of Service Law is of undoubted value, and it will in time conduce most strongly to the promotion of public safety.”

Twenty-second Annual Report of the Interstate Commerce Commission, for the year 1908, p. 52.

The Interstate Commerce Commission, by Ruling 74 of its administrative rulings on the Hours of Service Law, held that “employees deadheading on passenger or freight trains, and not required to perform any service in connection with the **movement of the train** upon which they are deadheading, are not while so deadheading, on duty.”

Hours of Service Law and Administrative Rulings and Opinions of Interstate Commerce Commission, printed March 25, 1912.

It is a well known fact that under the present arrangement, employes are entitled to receive pay in returning from points where they have been tied up for the sixteen hour period, and as relief crews for time spent in going to such points to relieve the tied up crews. If the contention of the Court below and the Government is correct, that during such period, because employes receive pay, that they are on duty within the meaning of the act, then it becomes unlawful for the carrier to use the employes for any period of time in excess of the sixteen hours from the time the relief crew starts from the terminal to relieve the crew tied up, and further makes it unlawful for the carrier to use the engine crew in any way for a period in excess of sixteen hours, which time must include both the time on duty con-

nected with the movement of the train, and the time required to deadhead back to the terminal point. This construction, furthermore, would necessitate the abrogation of the schedules in force, which allow pay to train employes for the time consumed in returning from the points of tieup, for, under the construction of the Court below, if they are paid for their time, they must be on duty. It is apparent that this was not the intention of Congress, and the ruling of the Interstate Commerce Commission, heretofore quoted, shows that the Commission never thought of construing the act in that way. The Commission specifically rules that although being paid, they are not on duty while deadheading to or from the point of tieup. Unless this were so, it would be unlawful for the carrier and the employe to contract that the employe should receive pay for the time spent in going from the place where the train is tied up to the terminal.

The Esch bill, as **originally** introduced on April 26th, 1906, being H. R. 18671, provided:

“The term ‘employes’ as used in this act shall include **conductors, brakemen, engineers, firemen, train dispatchers and telegraph operators** or other persons actually engaged in train operation or train service and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or contract.”

“Sec. 2. That from and after the first day of July, 1906, it shall be unlawful for any common carrier, its officers or agents subject to this act, to require or permit any employe, subject to this act, to be or remain on duty for a longer period than sixteen con-

secutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours **of rest**, and no such employe who has been relieved from duty after a service of any period less than sixteen hours, shall be required or permitted to go on duty again until he has had eight consecutive hours **of rest.**"

In the amendment to this bill, as shown by H. R. Report No. 4567, made upon May 31st, 1906, and which in substance was the act which became a law, the Congress demonstrated that it was not its intention that the act should be construed in the manner in which it has been construed by the trial Court in this case, or in the manner in which the Government contends it should be construed.

It was the contention of the trial Court and the Government that the act was intended not to apply to those persons while they were engaged in or connected with the movement only of any train, but was intended to apply to those persons who were actually engaged in or connected with the movement of any train, as a class. In other words, that the application of the act was determined by the class of the service of the employes, and not by the duty which they performed. The Congress struck from the first section of the act, in its definition of employes, the words "conductors, brakemen, engineers, firemen, train dispatchers, telegraph operators or other persons," and inserted in their place, the clause "the term 'employes' as used in this act shall include all

persons actually engaged in or connected with the movement of any train operation." This language was subsequently changed by omitting the word "operation."

From this it will be seen that it was the intention of Congress to eliminate the class definition and the prohibition of the use of firemen as a class, and to prevent the use of firemen while actually engaged in or connected with the movement only of any train.

That it was the purpose of Congress to limit the prohibition to the use of firemen on duty as such firemen, is clearly shown by the changes made in Section 2 of the act, as originally proposed. This act required that the employe "should not be permitted again to go on duty until he has had at least ten consecutive hours **of rest**," and the same provision with reference to the eight consecutive hours **of rest**. If it had been the intention of Congress to prohibit the use of firemen or other employes in any service, it would have allowed the act to remain as originally drawn, and require at least ten consecutive hours **of rest**, before the fireman could again be used as fireman. Instead of that, however, Congress' attention having been specifically called to the use of the words "of rest" by this report 4567, by the subsequent enactment into law of the bill as changed, it limited the use of the firemen to ten consecutive hours "*off duty*." If it had been Congress' intention to absolutely prohibit the use of firemen in any service, it would have required ten consecutive hours of rest from service of any kind. But having defined the duty prohibited,

as that which was actually engaged in or connected with the movement of any train, it chose to require him to be off duty with respect to such movement, and limited the prohibition to this extent. So that, if the fireman, during the ten consecutive hours off duty, or after the sixteen hours on duty, was not actually engaged in or connected with the movement of any train, the prohibition in the act did not apply.

(We have appended a copy of Report No. 4567 as Exhibit A to this brief.)

The use of these firemen as watchmen carries out the very spirit of the act of Congress. It is impossible to determine beforehand in railroad operation, just where the sixteen hours will expire, impossible to have at every isolated siding or sign-board, a skilled engine man, in readiness to care for the engine and protect the train, and it is furthermore impossible, in efficient railroad operation, to send a special engine or train crew to every point where there is a tieup. To use a fireman to kill an engine would necessitate his use beyond the period prescribed by the act, and would result in long and tedious delays in the transportation of freight and passengers. (*Record p. 14*).

The use of this fireman is purely incidental to a strict endeavor on the part of the carrier to comply, not only with the terms of the act, but with its spirit. It is an effort upon its part to give the other employes on the train, not only their eight or ten hours "off duty," but to ensure to them the same period "of rest"—going beyond the terms of the statute. The engine

man, as soon as he is relieved by another fireman, is given not only the eight or ten hours prescribed by the statute, but, as in this case, is given a considerably greater layoff, amounting here to five days.

There can be no question but that during the period in which Burgen was engaged in watching the engine, neither the safety of the train employes, nor traveling public, was in danger, nor that after his watch was over was he unfitted for future service, because he had more hours off duty and more rest than was ever thought necessary by the most extreme advocates. His employment as watchman was only casual and incidental, and had nothing to do with the safety of the traveling public or the train, which was emphasized in the debates of Congress in support of the act, and in the decisions which have upheld its validity and application. This employment is so casual and incidental that it cannot be believed that Congress intended to prohibit it, or to eliminate it and place upon the carrier the great burden which must necessarily follow, if engines cannot be taken care of in this manner.

There are, upon the Spokane division of this company, about 15 tieups a month. In order to provide engine watchmen at points at which they can conveniently be used upon the 300 miles of this division, located through a sparsely settled and thinly populated country, the carrier must supply itself with at least 15 additional watchmen, who, at even the low wage of \$50 per month, would entail a burden upon

this division alone of \$9000 a year. Of of the 970 trains a month operated by the company, only fifteen of them are tied up, and these tieups have occurred and are likely to occur at almost every one of the stations on the division. If skilled firemen had to be employed to be used as watchmen, the expense and burden to the company would be undoubtedly double the \$9000 a year, or something in the neighborhood of \$18,000 or \$20,000, and this would have to be borne for the purpose of averaging one employment of eight or ten hours for each of fifteen employes, and in an average working month of thirty days would necessitate the idling of 15 employes for 29 days, or the wasting of 435 working days, for the purpose of ensuring against the use of 15 half days of firemen as watchmen, whose only duty would be to replenish the water in the boiler and watch the fire in the fire^{box}room. (*Record p. 4*). That Congress never intended to impose such a burden upon railway companies is fully shown by the debates which are cited in this brief, and by the decisions of all the courts who have passed upon the act.

A fundamental fact, which should have a controlling influence in the decision of this case, is that the railway company in using Burgen as a watchman, was doing its very best to enforce the provisions of the act and carry out its spirit. What was being done was the obeying of the mandate of the law, in stopping the movement of the train and taking the men off duty connected therewith or actually engaged therein. This practice shows not only the evident intention

of the railway company to comply, but the actual compliance with the spirit of the act. Such compliance is conducive to the conservation of the ultimate object thereof—commerce—of all regulatory laws enacted by Congress under the Commerce clause.

The construction contended for by the Government is unreasonable, and is more technical than has been sanctioned by the Supreme Court of the United States, or by any of the courts dealing with the act, in decisions in which the question of purpose and intent of such act were in issue. That such unreasonable results will obtain, if the contention of the Government is correct, is fully shown by the stipulation of facts and the foregoing statement and proposition.

The spirit and purpose of a statute will control, as against a technical construction of the language thereof, if such technical construction appears to work unreasonable results.

“Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit or reason of the law will prevail over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely imperative. So the meaning of general terms may be restrained by the spirit or reason of the statute.”

State v. People's Nat'l Bank, 75 N. H. 27, 70 Atl. 542.

Wilkinson v. Leland, 2 Pet. 627, 7 Law Ed. 542.

Rigney v. Plaster, 88 Fed. 686.

People v. Lacombe, 99 N. Y. 43, 49; 1 N. E. 599.

Winters v. Duluth, 82 Minn. 127; 84 N. W. 788.

Parker v. Nothomb, 65 Neb. 308; 91 N. W. 395;
93 N. W. 851; 60 L. R. A. 699.

36 Cyc., 1108.

“Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended.”

U. S. v. Jackson, 143 Fed. 783.

People v. Earl, 42 Col. 238; 94 Pac. 294.

Coggeshall v. Des Moines, 138 Iowa, 730; 117 N. W. 309.

36 Cyc., 1110.

“The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage.”

Pickett v. United States, 216 U. S. 456; 30 Sup. Ct. Rep. 265; 54 L. Ed. 566.

“In *Henderson v. New York*, 92 U. S. 259, 268, 23 L. Ed. 543, 547, which involved the question whether a statute of New York was, in any real sense, a regulation of commerce with foreign nations, the court said that, in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.”

Western Union Tel. v. Kansas ex. rel. Coleman,
216 U. S. 1; 30 Sup. Ct. Rep. 190; 54 L. Ed. 355.

“Every statute ought to be expounded, not according to its letter, but according to the legislative intent, as manifested from all parts of the act; and the literal import should not be followed if the result would be absurd, provided any more reasonable view can be taken.”

United States v. Hogg, 112 Fed. 909. (Circ. Ct. of Appeals 6th Circ. 1902).

“Any construction that leads to absurd results should be avoided, where the trend of the act admits of a different, sensible application.”

Interstate Drainage & Inv. Co. v. Board of Comm'rs. of Freeborn Co., Minn., 158 Fed. 270. (Circ. Ct. of App. 8th. Circ. 1907).

“When the literal sense of a statute, if adopted as the legislative meaning, would lead to some absurd result, or shock the ordinary sense of justice, it is to be rejected, if some other meaning which is reasonable can be readily read therefrom by the aid of any rule for judicial construction which is applicable and, can reasonably be seen to be the real intent of the Legislature.”

State v. Chicago & N. W. Ry. Co. (Wis. 1906) 108 N. W. 595.

The decision of the Supreme Court of the United States in *U. S. v. A. T. S. & F. Ry.*, 220 U. S., 37, indicates that that Court does not intend to make a captious construction of the act, in order to be over technical in imposing penalties upon carriers. There an endeavor was made to recover a penalty for permitting a telegraph operator to remain on duty for a longer period than nine hours, in any twenty-four, in stations continuously operated night and day. The station in question was shut from 12 to 3 by day and by night. The Government contended that this was

a place continuously operated, night and day, and that when nine hours passed from the moment of beginning work, the operator could not be again worked until after the expiration of fifteen hours. The Court held that the nine hours referred to need not be consecutive, and that the operator might work for six hours, with an interruption and then for three, without the Railway Company incurring any penalty under the act. The Government's suggestion that he might be worked for two hours and then two hours off, and so on, was dismissed as hardly practicable.

"We see no reason to suppose that Congress meant more than it said."

Congress defined the employes included as those engaged in, or connected with the movement of a train. It did not intend to include those not so connected, and when the employe is not so connected, he is not included in the prohibited class.

The Supreme Court of the United States in the B. & O. case says that it was the purpose of Congress to limit the scope of the act to the ensuring of safety, by controlling the movements of those directly connected with the agencies upon which protection to life and property necessarily depends.

"The length of hours and service has direct relation to the efficiency of the human agencies, upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes

and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and to endeavor to reduce the dangers incident to the strain of excessive hours of duty of engineers, conductors, train dispatchers, telegraphers and other persons embraced within the class defined by the act."

Baltimore & Ohio R. Co. v. Interstate Com. Com.,
221 U. S., 612.

The act should be considered in the light of its purpose and object. The thought is, primarily, safety. Mr. Chief Justice Fuller said in the Safety Appliance Cases:

"The primary object of the act was to promote public welfare by securing the safety of employes and travelers, and it was in that aspect remedial; while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that respect it was penal."

Johnson v. Southern Pac. Co., 196 U. S. 17.

This construction of the act is the one adopted by another trial court, whose very opinion is cited to sustain the opinion of the court below in this case.

"The act being remedial for the purpose of preventing accidents to trains and consequent injuries to passengers and employes, it is the duty of the Courts to construe it liberally, in order to accomplish the purpose of the enactment.

Experience has shown that many serious accidents to trains, causing great loss of life or permanent disabilities to passengers as well as employes, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give that care and attention

necessary for the safety of the train. To prevent accidents from such causes, the Congress in its wisdom, enacted this statute, prohibiting the railroads, not only from requiring any employe subject to the act to remain on duty for a longer period than sixteen consecutive hours, but also "permitting it."

U. S. v. K. C. S. R. Co., 189 Fed. 471.

The opinion of the Court of Appeals of Kentucky in *St. Louis, Iron Mountain S. Ry. v. McWhirter*, is no longer authority for the extreme application of the statute, contended for by the Government, having been reversed by the Supreme Court of the United States in 33 *Sup. Ct. Rep.* 858.

Judge Rudkin in the *C. M. & P. S.* case very clearly shows that the purpose of the act is to limit its application to those persons in control of dangerous agencies.

"The purpose of the statute as indicated by its title, is to promote the safety of employes and travelers upon railroads, by limiting the hours of labor of those in control of dangerous agencies, lest by excessive periods of duty, they become fatigued and indifferent and cause accidents leading to injuries and destruction of life."

U. S. v. C. M. & P. S. Ry. Co., 197 Fed. 624.

Congress had in mind the reducing of accidents occasioned by permitting employes to remain in charge of dangerous agencies for a longer period of time than that prescribed by the statute, or by permitting them to again become in charge of such agencies, without having had the requisite number of hours of rest. It singled out two particular classes of employes which

it considered were likely to endanger their own lives and the lives of passengers, should they become fatigued by long hours of service when in control of dangerous agencies, or should they be permitted to resume control of such agencies without having certain number of hours of rest. The act assumes that it is practically safe for trainmen to operate trains for sixteen consecutive hours, and that it is unsafe for them to remain in charge of such trains over sixteen hours, or to take charge of a train without the requisite number of hours of rest, after having had charge of such a train.

It is perfectly apparent that when a train has been placed upon a sidetrack, taken out of operation, orders annulled and the switches locked, the train no longer endangers the safety of employes or passengers, persons, or property. It is so specifically stipulated in this case. Certainly, a fireman would not, in such work by reason of negligence occasioned by fatigue or otherwise, endanger the safety of employes or passengers. Having had five days' rest, after watching the engine, the purpose of the law is not contravened by a fatigued employee being entrusted with a dangerous agency.

The title of the act emphasizes the purpose of Congress in passing it as a safety measure. It is "An Act to Promote Safety of Employes and Travelers upon railroads by limiting the hours of service of employes thereon."

The President's Message to the Third Session of the 58th Congress, concerning the necessity of legislation, demonstrates that safety was the purpose in his mind.

"I would also point out to Congress the urgent need of legislation in the interest of public safety, limiting the hours of labor for railroad employes in train service upon railroads engaged in Interstate Commerce."

The debates in Congress show that this was the purpose of Congress.

Senator LaFollette in his speech on January 9th, 1907, reported in Volume 41 of Congressional Records, page 810, devotes most of his time to showing the number of railroad accidents occasioned by the use of engine men on duty as such engine men for excessive periods of time.

Senator Patterson at page 823 said:

"I heartily concur in everything that had been said about the necessity for a measure of this kind, not so much for the benefit of the railway men as for the traveling public. * * * I think the real necessity for this measure or a similar measure that can be made effective, is for the protection of the traveling public. The many accidents that have occurred resulting in deplorable loss of human life and the horrible maiming annually of thousands of people by reason of railway accidents, the result of the overworking of employes, constitute an appeal to Congress for legislation of this kind, which should be heeded."

Senator Dolliver at page 820 says:

"I have no doubt myself that the necessity of such legislation has been pressed upon the attention of nearly

everybody in the United States by the series of train disasters, involving both property and life, occurring all over the United States, many of them traceable to the overworking of employes—to the working of men during such intolerable hours of service as leaves them practically unable to discharge the business which is committed to their hands.”

And Senator Bacon, in referring to the remark of Senator Dolliver, says on page 822:

“Mr. President, I do not wish the Senator to resign the floor for the present, but I want to say to him that I think he uses an incorrect term when he speaks of the suggestion as a criticism upon the bill, because the suggestion is not in the way of criticism, but in the line of an effort to perfect the bill, to relieve it from imperfections, if possible, to put it in such a shape as not only to serve the purpose which the Senator has in view, of protecting the traveling public, but at the same time of imposing as little hardship as possible both upon the railroads and their employes.”

Representative Richardson says on February 18th in Volume 41 of the Congressional Record at page 3302:

“The protection of the lives of the people, as well as the lives of the employes themselves, is at stake. It is simply appalling to note in the public press the daily account of the loss of life by reason of some accident on railroads * * * It is a question of protecting the lives of the traveling public by administering proper punishment to a common carrier who requires or permits an employe to remain on duty so long that his physical senses are exhausted, and he becomes unfit to discharge his responsible duties.”

In the discussion of the bill on January 8th in the Senate, in Volume 41 Congressional Record, page 763, occurs the following colloquy:

“Mr. Bacon: In other words, without elaboration, it means to affect every railroad in the United States, long or short, within a State or crossing from one State to another.

Mr. LaFollette. Where the operation of the trains upon the line would jeopardize the lives of people who were being conveyed by a train engaged in interstate traffic.

Mr. Bacon: Mr. President, I presume none of us differ as to the desirability that there shall be protection as to the trains, whether they are trains upon railroads which are limited entirely to one State or trains upon railroads which pass from one State to another. But that does not necessarily carry with it the conclusion that the Federal Government should be given charge of the business of furnishing this desired protection. It is the desire of us all, without difference, that there shall be no murder committed, and that all who commit murder shall be punished. That does not in any manner make it proper that the Federal Government, because the end is desirable, shall overstep its legitimate power for the purpose of accomplishing it.”

The decided cases relating to train service, holding the companies liable to the penalties of the act, all show that the employe either had been left in charge of a train more than sixteen hours, or had been put in charge of the train without the requisite number of hours of rest. They violated the very object and purpose of the law by permitting a fatigued employe to be in charge of a train, thus endangering the safety of himself, fellow employes, passengers and property.

The Hours of Service cases are as follows:

U. S. v. A. T. S. & F. Ry., 220 U. S. 37.

A. T. S. & F. Ry. v. U. S., 177 Fed. 114.

U. S. v. Missouri Pac., Dist. Ct. of U. S. for Dist. of Kansas, First Div. Mch. 22, 1913.

U. S. v. Houston Belt & Terminal Ry. Co., Dist. Ct. of U. S. So. Dist. of Texas May 5, 1913.

B. & O. R. R. Co. v. Interstate Com. Com., 221 U. S. 612.

N. P. Ry. v. State of Washington, Ex. Rel., 222 U. S. 370.

U. S. v. Ill. Central Ry. Co., 180 Fed. 630.

U. S. v. St. L. S. W. Ry. Co. of Texas, 189 Fed. 954.

U. S. v. C. C. C. & S. L. Ry. Co., Dist. Ct. of U. S. for So. Dist. of Ohio, Dec. 12, 1911.

Black v. C. & W. C. Ry. Co., 69 S. E. 230.

U. S. v. Galveston H. & S. A., Dist. Ct. of U. S. for Dist. of Texas.

St. L. I. M. & S. Ry. v. McWhirter, 140 S. W. 672; reversed by U. S. Sup. Ct. 33 Sup. Ct. Rep. 858;———U. S.———

U. S. v. C. M. & P. S. Ry., 197 Fed. 624

U. S. v. D. & R. G. R. Co., 197 Fed. 629.

U. S. v. C. M. & P. S. Ry. Co., 195 Fed. 783.

U. S. v. Missouri Pac., decided May 8, 1913 by the District Court Western District of Missouri, Western Div., Judge Von Valkenberg.

U. S. v. Missouri Kans. & Texas Ry. Co., decided January 13, 1913, District Court District of Kansas, First Division, Pollock, District Judge.

The cases referred to by Court and date of decision have not yet been reported, but are published in pamphlet form by the Interstate Commerce Commission.

Judge Willard in the Schweig case in the District Court of Missesota, held that an employe who was load-

ing cars of stock, ordered to another part of the yard to see if eight other cars which were to be taken in the same train were ready for loading, who stepped upon the rear footboard of the engine for the purpose of complying with this order, and who was killed while riding thereon, is not actually engaged in or connected with the movement of any train; that the employe must be engaged in work which had some connection with the safety of the train or with the safety of persons, who might be injured by the movement of the train.

Schweig v. C. M. & St. P. Ry., 205 Fed 96.

In addition to these cases the act has been commented upon and referred to in the following cases:

Kansas City Southern Ry. Co. v. Quigley et. al.,
181 Fed. Rep. 190.

Missouri v. Wabash R. Co., 141 S. W. Rep., 646.

State v. Chicago, M. & St. P. Ry. Co., 136 Wis.
407; 117 N. W. Rep. 686.

People v. Erie R. Co., 198 N. Y. Rep 369; 91 N.
E. 849.

Lloyd v. No. Carolina R. Co., 66 S. E. Rep. 604;
57 Am. & Eng. R. Cas. N. S. 144.

State v. Missouri Pac. Ry. Co., 212 Mo. 658; 111
S. W. Rep. 500.

Montana v. Nor. Pac. Ry. Co., 93 Pac. Rep. 945.

State v. Texas & New O. R. Co., 124 S. W. 984.

There have also been cases decided by Judge Willard of the District Court of the United States for the District of Minnesota, which have not been reported.

U. S. v. M. & St. L. Ry.

U. S. v. G. N. Ry. Co.

Plaintiff in error does not contend for a decision that the law permit a fatigued employe to be in charge of a train, endangering the safety of persons or property. Neither do we claim the right to keep a fireman in the service of a train "in operation" over sixteen hours, nor the right to permit him to again go on duty and be placed in charge of a train in operation, without having had the full number of hours of rest. The purpose of the law is not contravened in this case. The object of the act was furthered by the taking of a train out of service, tying it up, and sending all the other members of the crew away from it, until after the expiration of the ten hour period. There could not be a more complete taking of a train out of service, than was done in this case.

The company does not countenance a practice which would lead to contravention of the law. It is apparent that there can be no incentive on the part of the railroads to encourage such a practice. There is every reason calling for the reduction, to a minimum, of the practice of having to tie up trains at all.

There are only two ways in which the use of a fireman as a watchman can be obviated. One is by killing the engine; the other by always having a sufficient number of men stationed along the line, so that a watchman would always be available at any point. If the engine is killed every time there is a tieup, it greatly reduces the efficiency of railroad systems. Every train that is killed must lose considerable time, because of the necessity of securing a fresh crew, re-

kindling the fire and awaiting the placing of the engine in condition for hauling the train. This would result not only in curtailing the working time of the crews themselves, to a great extent, but would also result in a great burden on the service to be afforded the public.

The placing of watchmen at each station is impracticable. It would not be reasonable to require the carrier to have a set of men known as watchmen, idling most of their time away at stations along the line, merely being held in readiness in the event that they might be needed to watch engines.

The stipulation shows that of the 88 stations along the line of the Spokane Division,, 35 have no post-office and 55 are merely names, without substantial population. It would seem impossible for a transcontinental line, traversing such a thinly populated country, to have such men in readiness at each station, besides placing the burden upon the carrier, at a large and needless expense.

The terminals of this system are located at the distances which usually obtain on transcontinental railroads in the same character of country, and under similar conditions as exist on the Spokane Division, and are established and maintained with reference to the usual custom of operating railroads, and the necessity of complying with the reasonable and ordinary conditions in the operation of such railway lines, and with a view to securing efficient operation, render sufficient service to the public, and affording reasonable hours

of work and rest for men, under usual and ordinary conditions.

What more can be reasonably asked of any carrier? Certainly, Congress did not contemplate by the passage of this act the requirement of anything more than was furnished by this plaintiff in error.

The tieups occurring at every station and siding along the line, it would be necessary for the carrier to have at least fifteen additional watchmen, located every twenty miles along the line. There are on the Spokane Division 970 trains operated a month, and out of this number there are but fifteen tieups. It is not reasonable to suppose that Congress intended that the carrier should employ these fifteen additional men on this division alone, for the purpose of taking care of these fifteen tieups, at an expense of at least \$9000 a year.

The plaintiff in error is not asking the Court to countenance a practice that is designed to contravene the law. It is asking it for a reasonable interpretation of the act, which will allow the carrier to continue a practice fully consonant with the dominant purpose of the law, and conducive to a more efficient, economical and satisfactory service to the public.

The primary purpose of the Hours of Service Act is the protection of the traveling public, and incidentally, that of the employes, in order to accomplish the traveling public's protection. The evil to be remedied by the act was the prevention and prohibition of the use of engine and trainmen for ex-

cessive periods of time, in the duties which involved the safety of the public. Congress, in passing the act, expressly repudiated the theory of protecting the employees, as a class, and by the change of the wording of the bills from the inclusion of a class of engineers, firemen, conductors, operators, etc. to "employees actually engaged in or connected with the movement of any train," and the elimination of the words "of rest" and the substitution of the words "off duty," declared that the purpose of the act was to prevent men who were tired out or fatigued by engaging in moving trains from continuing in such movement, and not to ensure a certain number of hours of work for such employees, regardless of the connection of such employees with the safety of the traveling public. The use of this fireman as a watchman was designed for the purpose, and did carry out the intent and spirit of the act. It worked no circumvention of the law. His use had nothing to do with the safety of trains or of persons or property on or about the same, nor did his duties have anything to do with the movement of the train. The train was on a sidetrack, out of operation, orders annulled and switches locked.

The situation here presented is different from that presented in any other case which has been decided by the courts in that the fireman under the circumstances of this case was neither left in train service after the expiration of the limitation prescribed by the statute, nor permitted again to resume service in connection with train operation until after

the requisite number of hours prescribed by the statute.

The construction of the statute contended for by the Government is unreasonable, and does not conform to its spirit. If such construction were enforced it would work injustice, and place a burden upon the railway company and upon commerce, the safety and conservation of which is the object of the law, which would be intolerable to the public and to the carriers. The railway company endeavored to, and did comply with the act, its spirit and intent, aided in the enforcing of its provisions and adopted a practice permitted by the terms of the law. It should not be fined for its endeavor to further the spirit of the law, and to protect the traveling public.

Respectfully submitted,

E. C. LINDLEY,

F. V. BROWN,

CHARLES S. ALBERT,

THOMAS BALMER,

Attorney's for Plaintiff in Error.

Appendix.
Exhibit A.59th CONGRESS
1st Session **H. R. 18671.**

(Report No. 4567.)

IN THE HOUSE OF REPRESENTATIVES.

April 26, 1906.

Mr. Esch introduced the following bill; which was referred
to the Committee on Interstate and Foreign
Commerce and ordered to be printed.

May 31, 1906.

Reported with amendments, referred to the House Calendar,
and ordered to be printed.

[Omit the part struck through and insert the part printed in italics.]

A BILL

To promote the safety of employees and travelers upon
railroads by limiting the hours of
service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers and property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place

in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall include ~~conductors, brakemen, engineers, firemen, train dispatchers, telegraph operators, or other~~ all persons actually engaged in *or connected with the movement of any train operation or train service*, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract.

SEC. 2. That ~~from and after the first day of July, nineteen hundred and six,~~ it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours ~~of rest off duty~~; and no such employee who has been relieved from duty after a *continuous* service of any period ~~less~~ *more* than ~~sixteen~~ *ten* hours shall be required or permitted to go on duty again until he has had eight consecutive hours ~~of rest off duty~~.

~~SEC. 3. That the Interstate Commerce Commission may, by its order, from time to time, upon full hearing and for good cause, reduce the maximum hours of continuous duty or uninterrupted rest specified in section two hereof. Such reduction shall be set forth in an order of the Commission, to be served upon the carrier and posted by said carrier upon its bulletin boards. Such order of the Commission shall remain in force and effect until changed by the Commission; and a failure to observe such order of the Commission by any common carrier, its officers or agents, shall be subject to the same penalty as is a violation of section two hereof.~~

Sec. 4. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, ~~or in violation of a lawful order of the Commission made under section three hereof,~~ shall be liable to a penalty of one *not to exceed five* hundred dollars for each and every violation, to be recovered in a suit or suits brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; *but no such suit shall be brought after the expiration of one year from the date of such violation;* and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided,* That the provisions of this Act shall not apply in any case where, by reason of unavoidable ~~or unforeseen train~~ accident or act of God ~~occurring after such employee has not known to the carrier or its agent in charge of such employee at the time he left a terminal, he is prevented from reaching his terminal within the time specified in section one of this Act:~~ *Provided further, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.*

Sec. 4. *That this Act shall take effect and be in force six months after its passage.*

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in
Error.

*Upon Writ of Error in the United States District Court
of Idaho, Northern Division.*

Brief of Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Defendant in Error, the United States, answering the brief of Plaintiff in Error, finds that the issues are compassed, as follows:

The Government contends that the fireman, Ed Bergen, was on duty longer than sixteen hours within the meaning of the Hours of Service Act. The record discloses that said fireman remained on duty continuously from July 10, 1912, at 6:00 a. m. to July 11, 1912, at 6:00 a. m., but, it is claimed by the railroad company that from July 10, at 9:59 p. m., to July 11th at 6:00 a. m. that the said

Bergen, while watching and keeping the engine alive, was not continuously engaged in or connected with the movement of any train.

The facts as stipulated show that the said fireman left the station at Hillyard on July 10th at 6:00 a. m. and continued to discharge his duties as fireman while the train was moving to Laclede, at which point it arrived at 9:59 p. m. of the same day. After the arrival at Laclede the train was sidetracked, leaving the line clear for the movement of any trains passing through Laclede station. The switches were locked at each end of the siding and remained locked until the fireman went off duty, so that no train movement was effected during the time the train was sidetracked. It is also stipulated that neither the train nor the engine could move without first releasing the brakes, and that during this time no orders were received pertaining to the movement of the train or permitted to be received. That said fireman, notwithstanding the foregoing conditions, was required to remain on the engine continuously from July 10th at 9:59 p. m. until July 11th at 6:00 a. m. to watch the quantity of water in the engine and replenish same so that the engine would always have a sufficient supply of water whereby steam could be efficiently and promptly generated so that when the engine was again to be moved it could do so under its own steam without delay in rebuilding fire in the firebox or generating steam to start with. It is further stipulated that on July 11th at 6:00 a. m. Bergen was relieved by another fireman and retired to the train for rest and did not go again on duty or perform duty of any kind until after he had rested five days.

From this summary of facts the question to be deter-

mined is: Was Bergen, the fireman, on duty more than sixteen hours within the meaning of the said Act?

The primary purpose of the Hours of Service Act is to protect persons and property being transported by the carrier as well as to secure the safety of the employees engaged in the service of the carrier. The Act therefore is one of paramount importance, dealing as it does with the safety of persons and the protection that should be accorded to property in transit.

Counsel for the railroad company have amplified on the debates in Congress at the time of the passage of the Act and have labored assiduously and earnestly to place a construction upon the word "employee" not contemplated by the framers of the law. The contention of the railroad company is that Bergen, the fireman, was not actually engaged in the movement of any train after July 10th at 9:59 p. m. and the company therefore is not amenable to the Hours of Service Act.

The language defining an employee under Section No. 1 of the Act is held to mean "persons actually engaged in, or connect with, the movement of any train." The word "connected" is significant in this case, bearing on the question involved. There can be no question but what the fireman was performing service in connection with the movement of the train. It was incumbent on the fireman to keep the train in condition ready to start without delays incident to refiring or generating steam. The construction contended for by the railroad company would in many instances cause the act to become inoperative. The reasoning advanced by the trial court, as set forth in his able opinion, is unanswerable: "That if the fireman could watch the engine after the time limit, he could do so before the time limit began and thus frustrate the real

purpose and spirit of the Act." To bring itself within the exceptions mentioned in the law, the carrier must be held to as high a degree and foresight as may be consistent with the object aimed at and the practical operation of its railroad. The delays incident to train operation, such as sidetracking, stopping for meals, switching, defects in equipment, and passing trains, are not sufficient to bring the carrier within the proviso as the time thus consumed is not taken into account in determining the sixteen-hour period of employment. How then by parity of reason can it be said that a fireman who has been engaged for fifteen hours and fifty-nine minutes can continue longer (the entire period in this case being twenty-four hours), why not for forty-eight hours and ad infinitum, and thus escape the penalties imposed by the act? Such a construction would be a perversion of the meaning intended and would place the operation of the road into the hands of men whose senses are deadened by long and strenuous hours of service and thus imperil the lives of those entrusted to their care and protection.

The case referred to in the brief of Plaintiff in Error, decided by Judge Pollock of the District of Kansas (not reported), is entitled to careful consideration as the questions involved in that case are similar to those before this Court. The facts as stipulated by the parties in that case were:

"The defendant permitted its locomotive fireman, Roy Scott, to go on duty on October 18, 1911, at 6 a. m. The run of this engine was from Pueblo, Colorado, to the station of Horace, Kansas. That at 10 p. m. on the night of that day the engine, not having completed its run, and having reached the station of Keyser, Kansas, the fireman signed the 'rest register,' but was by defendant company thereafter permitted to remain on his engine as watchman in

charge until the engine was drawn by another engine to the end of the run, Horace station, which was reached at 11:30 p. m. that night, the hours of continuous service of Scott on that day being as locomotive fireman from 6 a. m. to 10 p. m., as watchman in charge of the engine from 10 p. m. to 11:30 p. m.; total, 17 1-2 hours.

"From the statement made it is obvious the question presented is, Shall the time spent by the fireman as watchman in charge of his engine being drawn by another engine to the terminal station be computed in the hours of service as contemplated by the statute?

"As stated in the stipulation of the parties, the duties of the fireman so engaged as watchman in charge of his engine are to keep a certain amount of fire in the furnace, to see the water does not run too low in the boiler, and that a certain amount of steam pressure is preserved. Aside from such duties the engine employed in drawing the train is in charge of another crew, as is the movement of the train itself.

"The term 'employee,' as employed in and defined by the act itself, is 'persons actually engaged in or connected with the movement of any train.' While it is quite clear a watchman so in charge of an engine has no control over the train movement, hence is not actually engaged in such movement, it is not so clear he is in no manner connected with the movement of the train. While the question presented is, so far as I find, of first impression, yet, considering the remedial nature and humane purpose of the act, the character of the duties imposed upon such watchman, as stipulated by the parties, and all the facts and circumstances presented by the record to which consideration should be given, I am forced to the conclusion the time so spent by a locomotive fireman in watching his engine must be computed as hours of service within the purview of the act, and for the following, among other reasons which might be given.

"The human feature of the statute being considered, it must be thought the Congress intended, at or before the expiration of the sixteen-hour period of service provided therein, an employee engaged in

the movement of the train would, from exhaustion of body and mind, be in need of relaxation and rest, freed from all responsibility and care for the safety of himself and others. That the cab of a moving engine in which such watchman is required to ride is not such place as in the absence of any duty to be performed is conducive to that rest and relaxation required by the statute, is a matter of common experience and knowledge. However, when to this self-evident fact, as in this case, there is superadded the duties imposed on one so situate, as by the parties stipulated, the question of relaxation, rest, and sleep required by the statute must be almost if not altogether impossible.

"Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employee himself, and looking alone to the safety of the employee and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep, he should permit the water in the boiler to be entirely consumed, the danger from wreck of the train or other disaster by explosion, involving himself and others, is apparent.

"All things considered, I am of the opinion it must be held such watchman is in a manner actually engaged in connection with the movement of the train, and to such extent as brings the time so consumed within the hours of service as contemplated by the act. If such construction of the statute is correct, and it shall impose a burden too severe on railroad companies, the remedy lies with the law-making power, not with the courts."

The case of *U. S. vs. C. M. & P. S. Ry. Co.* (197 Fed. 624), the decision being rendered by Judge Rudkin of the Eastern District of Washington and referred to by Plaintiff in Error, merits consideration as it is claimed by the railroad company in that case that the continuity was broken by the laying-off of the train crew while waiting for a helper engine for an indefinite time which proved to be about three hours. The Court says:

“Nor should the brief periods allowed for meals be deducted from the time of service, in order to break its continuity. The statute uses the terms, ‘sixteen consecutive hours,’ and ‘continuously on duty;’ and while, literally speaking, ‘consecutive’ means succeeding one another in regular order, with no interval or break, and the word ‘continuously’ means substantially the same, yet it is manifest that no such strict or literal meaning of these expressions was intended. The purpose of the statute, as indicated by its title, is to promote the safety of employes and travelers upon railroads, by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent, and cause accidents leading to injuries and destruction of life. *New York vs. Erie R. Co.* 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 39 Am. St. Rep. 828, 19 Ann. Cas. 811.

“And while the statute is penal in its nature, it is in some aspects remedial and should be so construed as to promote the apparent policy and object of the Legislature, and not entirely defeat its purpose. *Johnson vs. Southern Pac. Co.* 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

“Thus, in *U. S. vs. St. Louis S. W. Ry. Co. of Texas* (D. C.), 189 Fed. 954, it was held that an office which was closed four times a day, for a period of one hour each, was continuously operated night and day, within the meaning of the proviso to the section now under consideration. And in the case of *U. S. vs. Atchison, T. & S. F. Ry. Co.* 220 U. S. 37, 31 Sup. Ct. 362, the court rather intimated that a station closed for two periods of three hours each day was operated continuously night and day, within the meaning of the same proviso. In the course of its opinion in the case last cited the court said:

“‘A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.’

“I can not believe that by the expressions, ‘sixteen consecutive hours,’ and ‘continuously on duty,’ Con-

gress intended to include only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employees from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side-track waiting for another train, and thus defeat the very object the Legislature had in view. The brief interruptions for meals were 'trifling interruptions,' in the language of the Court in the Atchison case, *supra*. * * *

"The facts in relation to the twenty-second and five succeeding counts are as follows: The train crew in question ran from Seattle to Laconia, and on the 16th day of June, 1911, left the former station at about 1:30 a. m. At some point on the line they were to be met by a helper to assist them up the mountain grade. They arrived at the point where the helper was to join them at 9:55 a. m. Upon their arrival there the helper was delayed for some cause, and the trainmaster or some officer of the railway company immediately relieved the crew from duty until the helper should arrive. This, as it afterwards transpired, was a period of about three hours, or not until 1 p. m. The crew then proceeded upon its way and arrived at its destination at about 7:25 p. m. If the three hours' lay-off is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time of service exceeded that limited by law. If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service. Atchison Case, *supra*. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what mo-

ment the train might move, and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption.

"The facts in this case demonstrate the absurdity of the company's claim. According to its view of the law, it may work its employes for the full period of 16 hours, allow them two hours and forty-five minutes off for their meals, lay them off for three hours at a siding in the mountains to wait for a helper, and thus leave them two hours and fifteen minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public. I therefore adjudge the defendant guilty as to these six counts also."

Judge Hanford of the Western District of Washington, in the case of *U. S. vs. C. M. & Puget Sound Ry. Co.* 193 Fed. 783, defines an employee as one who is on duty when he is at his post in obedience to rules or requirements by his superior and ready and willing to work whether actually at work or awaiting for orders, or for the removal of hindrances from any cause.

The words "on duty" appear to have been intelligently chosen and used in the composition of the statute to bar all excuses for non-compliance with its requirements by any pretext or misunderstanding of its meaning.

U. S. vs. Ill. Cen. Ry. Co. 180 Fed. 630.

The Act further provides in Section No. 1 that the term "employees" as used in the act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Held, that where an interstate carrier had a rule requiring engineers to report thirty minutes before leaving time, during which they were required to overlook their engines in preparation for the trip, to see if they were properly oiled and the brakes O. K. and to connect the engines with their trains, the time

so occupied constitutes a part of their time of duty; and this, though it was the custom of the carrier not to strictly enforce the rule." * * * Idem.

District Judge Morris says:

"In my opinion this man was on duty within the meaning of the act, from the time he went there and commenced to supervise, or overlook that engine in preparation for the trip. It does not make any difference whether he was paid for his time or not. That was the time his work and the strain on him began. The work of an engineer and an employee of the railroad begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train. He must look over that engine. He must see that it is oiled up. He must see that the air brakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion he is on duty within the meaning of the act during the time he is doing these things. If he goes there half an hour before the time to start to do these things, during the time he is there doing them he is on duty." Idem.

The term "employee" as used in the act shall be held to mean persons actually engaged in or connected with the movement of any train.

The pivotal question in this case is the meaning to be placed upon the phrase "connected with the movement of any train" as used in the first section of the act. The words "in connection with that company's railways" as used in the order of Court directing a Receiver of a railroad to pay laborers and employees of the company for labor and services actually done "in connection with that company's railways" are the equivalent of "in the interest and upon the employment of that company in and about its railway and the operation and management thereof, and all matters connected with, relating to, and growing

out of the proper and legitimate business of the company as the possessor and operator of such railways." The phrase was intended to and does embrace every employment for the performance of any service in promoting the interest and enforcing and defending the rights of the company as a railway corporation in respect to its railways in its possession and under its management.

Gurney vs. Atlantic & G. W. R. Co. 58 N. Y. 358, 371.

Vol. 4, Words and Phrases, p. 3470.

The words "connected with" are here used in a generic sense and must include every duty devolving on one engaged in train service. While Burgen's duties are apparently circumscribed after 9:59 p. m. on July 11th, yet he was performing a valuable service, requiring diligence, and he would have been called upon in case of disturbance to defend with such force as he could have commanded the company's rights. Burgen's duties were therefore active and not passive, and related to any train not necessarily a moving train, and comes within the purview of the act.

The act, being remedial in its nature, must receive such construction as will give to its general purpose reasonable effect.

U. S. vs. Kansas City Ry. Co. 189 Fed. 471.

No error having been made by the trial court, the judgment should be affirmed.

Respectfully submitted,

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